CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 240.

WINTHROP ASTOR CHANLER, THOMAS T. SHERMAN, AS COMMITTEE FOR JOHN ARMSTRONG CHANLER, ET AL., PLAINTIFFS IN ERROR,

vs.

OTTO KELSEY, COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK AND STATE OF NEW YORK.

FILED MARCH 28, 1906.

(20,152.)

(20,152.)

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Court of Appeals.

NEW YORK, ss:

he Court of Appeals, held at the Capitol, in the city of
on the 12th day of December, in the year of our Lord
usand nine hundred and five, before the Judges of said

the Hon. Edgar M. Cullen, Chief Judge, presiding.

W. H. SHANKLAND, *Clerk.*

tur Dec. 13th, 1905.

the Matter of the Appraisal, under the Act in Relation to
Taxable Transfers of Property, of the Property of LAURA
ASTOR DELANO, Deceased.

membered, that on the 22d day of July, in the year of our
thousand nine hundred and five, John Hubert de Stuers
rs, the appellants in this proceeding, came here into the
ppeals, by Roosevelt & Kobbe and others, their attorneys,
in the said Court a Notice of Appeal and return thereto
order of the Appellate Division of the Supreme Court in
e First Judicial Department. And the Comptroller of the
New York, the respondent in said proceedings, after-
eared in said Court of Appeals by Edward H. Fallows, his

said Notice of Appeal and the return thereto filed as afore-
d, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this
se argued by Mr. Lucius H. Beers, of counsel for the ap-
nd it having been submitted by counsel for the respondent,
due deliberation had thereon, did order and adjudge that
of the Appellate Division of the Supreme Court appealed
in be, and the same hereby is affirmed, with costs.

was also further ordered, that the record aforesaid, and the
gs in this Court, be remitted to the Surrogate's Court of
y of New York, there to be proceeded upon according to
v.

Therefore, it is considered that the said order be affirmed,
h costs, as aforesaid.

ereupon, as well the Notice of Appeal and return thereto
as the judgment of the Court of Appeals aforesaid, by them
the premises, are by the said Court of Appeals remitted
Surrogate's Court of the County of New York before the
s thereof, according to the form of the statute in such case
l provided, to be enforced according to law, and which

record now remains in the said Surrogate's Court before the Surrogates thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE.
ALBANY, *Dec. 13th*, 1905.

I Hereby Certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein attached thereto.

[Seal State of New York Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

e Filed Jul- 22, 1905.

Court of Appeals.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

Papers on Appeal from Order Fixing Tax.

Edward H. Fallows, Attorney for Respondent, 170 Broadway, New York City.
Lucius H. Beers, Counsel for Appellants, 49 Wall Street, New York City.

1 Court of Appeals.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

Statement.

This proceeding was commenced by the filing of a petition by Franklin B. Lord, one of the executors of Laura Astor Delano, deceased, for the appointment of an appraiser herein on the 18th day of November, 1902.

The original parties to this proceeding were John Jacob Astor, Franklin B. Lord and Warren Delano, Jr., executors of Laura Astor Delano, deceased, John Hubert de Stuers, Margaret de Stuers Oberndorff (formerly Margaret de Stuers), Hubert de Stuers, John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, The Union Trust Company, as trustee for said John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret

Livingston Chanler, Robert Winthrop Chanler and Alida Beekman Emmet and their children and Arthur Astor Carey.

2 A hearing was had before the appraiser herein, at which Franklin B. Lord, Edmund L. Baylies and the New York Life Insurance and Trust Company as trustees, Franklin B. Lord and Lucius H. Beers and Robert William Gillespie-Stainton as trustees and Franklin B. Lord and Lucius H. Beers as trustees appeared in addition to the foregoing, and the appraiser filed his report on December 9, 1903, upon which report the order of December 11, 1903, herein was entered.

The infants Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman became parties to this proceeding by the appointment of Egerton L. Winthrop, Esq., as their special guardian herein, on or about February 17, 1904. The infants Elizabeth Winthrop Emmet, Mary Chanler Emmet, Christopher Temple Emmet, Jr., and Hester Alida Emmet became parties to the proceeding by the appointment of Grenville T. Emmet, Esq., as their special guardian by an order herein dated February 2, 1904. The infants Dorothy Chanler, Lewis Stuyvesant Chanler, Jr., Alida Chanler and William Astor Chanler, 2nd, became parties hereto by the appointment of Bronson Winthrop, Esq., as their special guardian herein by order entered on or about February 17, 1904.

All the above named parties appealed to the Surrogate from said order of December 11, 1903. That order was affirmed by an order entered March 22, 1905. All the above named parties then appealed to the Appellate Division of the Supreme Court, First Department, which Court affirmed the said order of the Surrogate's Court entered March 22, 1905. There has been no change in parties in this proceeding except as above stated.

3 *Notice of Appeal to Appellate Division.*

Surrogates' Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

GENTLEMEN: Please take notice that John Hubert de Stuers, Margaret de Stuers Oberndorff (formerly Margaret de Stuers), Hubert de Stuers, John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, and the Union Trust Company as Trustee for the said John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, and their children, Arthur Astor Carey, and the infants, Laura Astor Chanler, Beatrice Margaret Mary Chanler,

Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman, by Egerton L. Winthrop, Jr., their special guardian; the infants Elizabeth Winthrop Emmet, Mary Chanler Emmet, Christopher Temple Emmet, Junior, and Hester Alida Emmet, by Grenville T. Emmet, their special
4 guardian; the infants Dorothy Chanler, Lewis Stuyvesant Chanler, Junior, Alida Chanler and William Astor Chanler, Second, by Bronson Winthrop, their special guardian, persons interested in the property appointed by Laura A. Delano in her last Will and Testament, under and by virtue of certain powers of appointment, created as follows:

(1.) A power of appointment created by William B. Astor, by deed dated September 30, 1848.

(2.) A power of appointment created by William B. Astor, by deed dated September 10, 1844.

(3.) A power of appointment created by William B. Astor, by deed dated October 28, 1865.

(4.) A power of appointment created by William B. Astor, by deed dated September 6, 1849.

hereby appeal to the Appel-ate Division of the Supreme Court of the State of New York, in and for the First Judicial Department from an order of Hon. Frank T. Fitzgerald, one of the Surrogates of the County of New York, made and entered herein on the 22nd day of March, 1905, affirming the order theretofore made and entered herein on the 11th day of December, 1903, fixing a tax upon the estate of the said decedent under the act relating to taxable transfers, on the following grounds, to wit:

(1.) That Chapter 284 of the Laws of 1897 does not apply to the property so appointed to these appellants for the reason that said property was acquired by them under deeds made in the years 1844, 1848, 1849 and 1865.

(2.) That Article X of Chapter 908, Laws of 1896, and the amendments thereto, as applied to the rights and interest of the ap-
5 pellants herein, is unconstitutional and void, and that it is repugnant to Section 10, Article I of the Constitution of the United States, in that it impairs the obligation of contracts between William B. Astor and the appellants herein.

(3.) That Article X of Chapter 908, Laws of 1896, and the amendments thereto, as applied to the rights and interests of the appellants, is unconstitutional and void as being repugnant to Section I of the XIV Amendment of the Constitution of the United States in that it seeks to deprive citizens of property without due process of law, and to deny to persons affected thereby the equal protection of the laws.

(4.) That such portions of the property transferred by said deeds of 1844, 1848, 1849 and 1865 as were, under the terms of any of said deeds granted to any of the said appellants on failure of appointment by said Laura A. Delano are not subject to any tax herein.

(5.) That if the property appointed to, or in trust for, any of the

appellants herein under the terms of said deeds of 1844, 1848, 1849 and 1865, is held to be subject to a tax herein, such tax should be fixed with respect to the relationship of the appellants herein to William B. Astor and not with respect to their relationship to the said Laura Astor Delano.

Dated New York, March 29, 1905.

ROOSEVELT & KOBBE,
Attorneys for Arthur Astor Carey,
44 *Wall Street, New York City.*

MORRIS, SENTELL & MAIN,
Attorneys for Winthrop Astor Chanler, Elizabeth Winthrop
6 *Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler and Alida Beekman Emmet,* 16 *Exchange Place, New York City.*

EVARTS, TRACY & SHERMAN,
Attorneys for Thos. T. Sherman, as Committee for John Armstrong Chanler, 52 *Wall Street, New York City.*

HOWARD MANSFIELD,
Attorney for John Hubert de Stuers, Margaret de Stuers, Oberndorff and Hubert de Stuers, 49 *Wall Street, New York City.*

PECKHAM, MILLER & KING,
Attorneys for The Union Trust Company, as Trustee, 80 *Broadway, New York City.*

EGERTON L. WINTHROP, JR.,
Special Guardian for the Infants Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman, 48 *Wall Street, New York City.*

GRENVILLE T. EMMET,
Special Guardian for the Infants Elizabeth Winthrop Emmet,
7 *Mary Chanler Emmet, Christopher Temple Emmet, Jr., and Hester Alida Emmet,* 52 *Wall Street, New York City.*

BRONSON WINTHROP,
Special Guardian for the Infants Dorothy Chanler, Lewis Stuyvesant Chanler, Jr., Alida Chanler and William Astor Chanler, Second, 32 *Liberty Street, New York City.*

To James A. Donnelly, Esq., Clerk of the Surrogates' Court, New York County.

Edward H. Fallows, Esq., Attorney for Comptroller of the State of New York.

Henry de Forest Baldwin, Esq., Attorney for Executors of Laura A. Delano.

8 *Petition for Appointment of Appraiser Read by Respondent.*

Surrogates' Court, County of New York.

In the Matter of the Transfer Tax upon the Property Transferred and Appointed by the Last Will and Testament of LAURA ASTOR DELANO, Deceased.

To the Surrogates of the County of New York:

The petition of Franklin B. Lord respectfully shows:

First: That your petitioner is one of the Executors of the last Will and Testament of Laura Astor Delano, deceased, and as such is a person interested in the property transferred by her last Will and Testament.

Second: That said decedent departed this life on the 15th day of June, 1902, at Geneva, in the Republic of Switzerland.

Third: That Letters Testamentary on the estate of said deceased were, on the 14th day of October, 1902, issued to your petitioner in conjunction with John Jacob Astor and Warren Delano, Jr., the Executors named in the Will, by the Surrogates' Court of the County of New York.

Fourth: That, as your petitioner is informed and believes a portion of the property of said decedent transferred by said last
9 Will and Testament or the property appointed thereby, by virtue of certain powers of appointment in said decedent vested, is or may be subject to the payment of the tax imposed by law in relation to taxable transfers of property.

Fifth: That all persons who are interest- in said estate and who are entitled to notice to all proceedings herein, and their post office addresses, are to the best of your petitioner's information, knowledge and belief as follows:

Nathan L. Miller, Comptroller of the State of New York, State House, Albany, New York.

Franklin B. Lord, No. 49 Wall Street, Manhattan, New York.

John Jacob Astor, No. 23 W. 26th Street, Manhattan, New York.

Warren Delano Jr., No. 1 Broadway, Manhattan, New York.

John Hubert de Stuers, Margaret de Stuers, Hubert de Stuers, c/o Lord, Day & Lord, No. 49 Wall St., Manhattan, New York City.

John Armstrong Chanler, c/o Thomas T. Sherman, No. 52 Wall St., Manhattan, New York City.

Thomas T. Sherman, as Committee of the property of said John Armstrong Chanler, No. 52 Wall Street, N. Y.

Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, Laura A. Chanler, c/o Henry L. Morris, 16 Exchange Place, Manhattan, New York.

10 Sixth: That petitioner is informed and believes that all of the above named persons are of full age and sound mind, except Laura A. Chanler who is under the age of twenty-one years,

and John Armstrong Chanler, who has been judicially declared incompetent to manage his affairs and Thomas T. Sherman has, by the Supreme Court of this State, been appointed the Committee of his property.

Wherefore your petitioner prays that you will determine whether or not any of the property transferred or appointed by the last Will and Testament of Laura A. Delano, deceased, is subject to the tax imposed by law in relation to taxable transfers.

Dated New York, November 14, 1902.

FRANKLIN B. LORD, *Petitioner.*

STATE OF NEW YORK, *County of New York, ss:*

Franklin B. Lord, being duly sworn, says:

That he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

FRANKLIN B. LORD.

Sworn to before me this 17th day of November, 1902.

MORRIS U. ELY,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

11 *Affidavit of Coleman E. Kissam, Read by Respondent.*

Surrogate's Court, County of New York.

In the Matter of the Transfer Tax upon the Property Transferred and Appointed by the Last Will and Testament of LAURA ASTOR DELANO, Deceased.

COUNTY OF NEW YORK, *ss:*

Coleman E. Kissam, being duly sworn, says:

That he has charge of the above entitled proceeding in the office of Lucius H. Beers, attorney for the petitioner herein, Franklin B. Lord. That through inadvertence the name of Arthur Astor Carey was omitted among the parties interested in said estate and who are entitled to notice of all proceedings therein.

That deponent asks that his name be included among those persons so interested and that notice of all proceedings be sent him at his post office address as follows: Arthur Astor Carey, care Roosevelt & Kobbe, 44 Wall Street, New York.

COLEMAN E. KISSAM.

Sworn to before me this 18th day of November, 1902.

ELI G. PARTRIDGE,
Notary Public, New York County.

12 *Order Appointing Appraiser, Read by Respondent.*

At a Surrogate's Court held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 18th day of November, 1902.

Present: Hon. Frank T. Fitzgerald, Surrogate.

In the Matter of the Transfer Tax upon the Property Transferred and Appointed by the Last Will and Testament of LAURA ASTOR DELANO, Deceased.

On reading and filing the petition of Franklin B. Lord, one of the Executors of the last Will and Testament of Laura Astor Delano, deceased, I do hereby, pursuant to the requirements of Chapter 658 of the Laws of 1900, direct that Robert Mazet, Esq., one of the appraisers appointed by the State Comptroller under said statute, to fix the fair market value of so much of the property transferred and appointed by the last Will and Testament of Laura Astor Delano, deceased, which is subject to the payment of the tax imposed by the laws in relation to taxable transfers of property.

FRANK T. FITZGERALD, *Surrogate.*

13 *Notice of Hearing, Read by Respondent.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

You will please to take notice that, by virtue of an order of Hon. Frank T. Fitzgerald, one of the Surrogates of the County of New York, made and dated the 18th day of November, 1902, and pursuant to provisions of Chapter 908 of the Laws of 1896, relating to taxable transfers of property, and the acts amendatory thereof, I shall on the 26th day of November, 1902, at 3 o'clock in the afternoon of that day, at room No. 1404, Home Life Building, Nos. 256 and 257 Broadway, in the Borough of Manhattan, City of New York, proceed to appraise at its fair market value all the property of said Laura Astor Delano, deceased, late of the said city, passing by her last Will and Testament or by the Intestate Laws of the State of New York, which is subject to the payment of the tax imposed by the said Act and the Acts amendatory thereof.

And of such of you as are hereby notified as are under the age of twenty-one years, are required to appear by your guardian, if you have one, or, if you have none, to appear and apply for one to be appointed, or in the event of your neglect or failure to do so, a guardian will be appointed by the Surrogate to represent and act for you in the proceeding.

New York, November 19, 1902.

ROBERT MAZET, *Appraiser.*

14 *Report of Appraiser, Read by Respondent.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

To the Surrogates' Court of the County of New York:

I, Robert Mazet, who was, by an order of Honorable Frank T. Fitzgerald, one of the Surrogates of New York County, made and entered on November 13th, 1902 (certified copy of which order is hereto annexed), directed to act as appraiser pursuant to Chapter 908 of the Laws of 1896, and the Acts amendatory thereof and supplemental thereto, do respectfully report:

FIRST. Having filed my oath of office in the State Comptroller's office pursuant to Chapter 173 of the Laws of 1901, I gave notice by mail, postage prepaid, to all persons known to have or claim an interest in all property subject to the tax imposed by said law, to wit:—to the following persons, being those named in the petition for said order, of the time and place at which I would appraise the property of Laura Astor Delano, deceased, subject to the payment of said tax; a true copy of said notice is also hereto attached:

Hon. Edward H. Fallows,
Lucius H. Beers, Esq.,
Franklin B. Lord,
John Jacob Astor,
Warren Delano, Jr.,
John Hubert de Stuers,
15 Margaret de Stuers,
Hubert de Stuers,
John Armstrong Chanler,
Thomas T. Sherman (as committee of the property of John Armstrong Chanler),
Winthrop Astor Chanler,
Elizabeth Winthrop Chapman,
William Astor Chanler,
Lewis Stuyvesant Chanler,
Margaret Livingston Chanler,
Robert Winthrop Chanler,
Alida Beekman Emmet,
Laura A. Chanler,
Arthur Astor Carey.

SECOND: I further report that at the time and place in said notice stated, to wit:—on November 26th, 1902, at 3 o'clock in the afternoon, at Room 1404, Home Life Building, 256 Broadway, Borough of Manhattan, City of New York, and at other and subsequent times and at divers places, I appraised the estate of Laura Astor Delano, deceased, together with all property appointed by the last will and testament and codicil of Laura Astor Delano, deceased, subject to

tax herein, at its fair market value on June 15th, 1902, the date of her death, as follows:

Real Property.

1. Individual estate of Laura Astor Delano within the State of New York at the time of her death:

341 Fifth Avenue, lot and building.....	$135,000.00	
343 " "	135,000.00	
345 " "	140,000.00	
347 " "	140,000.00	
67 Third Avenue, "	30,000.00	
		$580,000.00
16 Brought forward.....		$580,000.00

2. Property devised by tenth article of the will of John Jacob Astor to William B. Astor for life, with power to appoint, and by the fifth article of the will of William B. Astor devised to Laura Astor Delano, with power to appoint:

268 Sixth Avenue		
270 "		
272 "		
274 "	$425,000.00	
276 "		
61 West 17th St., lot and building.....		
55 W. 17th St., lot and bldg.....	50,000.00	
57 " "	50,000.00	
59 W. 17th St., lot and bldg.....	50,000.00	
308 W. 15th St., "	13,000.00	
310 " "	13,000.00	
		$601,000.00

3. Property devised by the second clause of the fifth codicil of the will of William B. Astor to Laura Astor Delano for life with power to appoint:

190 Madison Ave., lot and bldg.....	$150,000.00	
15 East 34th St., " " stable.....	80,000.00	
		230,000.00

4. Property belonging to trust estate created by fifth clause of the will of William B. Astor, with power to appoint:

382 Broadway, lot and bldg.....	$225,000.00	
331 W. 14th St., "	18,000.00	
		243,000.00
Carried forward.....		$1,654,000.00

17	Brought forward		$1,654,000.00
	5. Property conveyed by William B. Astor and his wife to Laura Astor Delano for life, with power of appointment, by deed dated September 30, 1848:		
45	Lafayette Place, lot and bldg.....		50,000.00
	6. Real property conveyed by William B. Astor and his wife to Laura Astor Delano for life, with power of appointment, by deed dated September 10, 1844, said lands being known as the Cozine Farm:		
	Block 1045.		
911	Eighth Avenue		
303	W. 54th St.,	subject to lease...	$55,000.00
913	Eighth Avenue		
915	"		
919	"	" ...	60,000.00
305	W. 54th St.,		
921	Eighth Avenue		
923	"	" ...	45,000.00
925	"		
927	"	" ...	60,000.00
302	W. 55th St.,		
307	W. 54th St.,	" ...	11,000.00
304	W. 55th St.,	" ...	8,000.00
306	"	" ...	8,000.00
308	"	" ...	8,000.00
310	"	" ...	8,000.00
312	"	" ...	8,000.00
314	"	" ...	8,000.00
316	"	" ...	8,000.00
318	"	" ...	8,000.00
320	"	" ...	8,000.00
322	"	" ...	8,000.00
324	"	" ...	8,000.00
	Carried forward		$319,000.00 $1,704,000.00
18	Brought forward		$319,000.00 $1,704,000
326	W. 55th St., subject to lease.....		8,000.00
328	"	"	8,000.00
330	"	"	9,500.00
332	"	"	9,500.00
334	"	"	9,500.00
336	"	"	9,500.00
338	"	"	9,500.00
340	"	"	9,500.00
342	"	"	9,500.00
344	"	"	9,500.00

346	W. 55th St., subject to lease.....		$9,500.00	
348	" "		9,500.00	
350	" "		9,500.00	
352	" "		9,500.00	
354	" "		9,500.00	
356	" "		9,500.00	
358	" "		9,500.00	
360	" "		9,500.00	
362	" "		9,500.00	
364	" "		9,500.00	
366	" "		9,500.00	
368	" "		6,500.00	
370	" "		6,500.00	
372	" "		6,500.00	
321	W. 54th St.,			
323	"			
325	"	12 vacant lots,		
327	"	$120,000.		
337 adj.	"			
339/351	"			
Less for gores appraised hereafter, $13,200, $7,400.....		20,600.		
			99,400.00	
830	Ninth Ave., subject to lease.....		12,000.00	
832	" "		12,000.00	
834	" "		5,000.00	
836	" "		5,000.00	
838	" "		5,000.00	
840	" "		7,000.00	
	Carried forward.....		$680,400.00	$1,704,000.00
19	Brought forward..		$680,400.00	$1,704,000.00
	Block 1046.			
329	W. 55th St., subject to lease.....		8,000.00	
331	" "		8,000.00	
333	" "		8,000.00	
347	" "		9,500.00	
349	" "		9,500.00	
351	" "		9,500.00	
353	" "		9,500.00	
355	" "		9,500.00	
357	" "		9,500.00	
359	" "		9,500.00	
361	" "		9,500.00	
363	" "		9,500.00	
365	" "		9,500.00	

842, 844, 846, 848, 850, 371, 373, 375	Ninth Ave. plot, subject to lease. West 55th St.	.....	50,000.00
	Block 1064.		
831	Ninth Ave., subject to lease.....		7,500.00
833	" "		7,500.00
835	" "		7,500.00
837	" "		7,500.00
839	" "		9,500.00
402	W. 55th St., "		7,500.00
404	" "		8,500.00
406	" "		8,500.00
408	" "		4,500.00
410	" "		4,500.00
412	" "		6,000.00
414	" "		6,000.00
416	" "		5,500.00
418	" "		5,400.00
420	" "		5,200.00
430-442	" plot 6½ lots, vacant.....		45,500.00
	Carried forward.....		$996,000.00 $1,704,000.00
20	Brought forward		$996,000.00 $1,704,000.00
452	W. 55th St., subject to lease.....		7,000.00
454	" "		7,000.00
456	" "		7,000.00
828	Tenth Ave., with old bldg.....		7,000.00
	Block 1065.		
841	Ninth Ave., subject to lease.....		9,000.00
843	" "		7,000.00
845	" "		7,000.00
849, 851	" "		25,000.00
403	W. 55th St., "		4,000.00
405	" "		3,800.00
407	" "		6,000.00
409	" vacant lot		6,000.00
411	" "		10,500.00
413	" "		7,650.00
415	" "		7,650.00
417	" "		7,500.00
419	" "		7,500.00
421	" "		7,000.00

421a	W. 55th St., vacant lot	$500.00	
423	" "	7,000.00	
423a	" "	525.00	
425	" "	7,000.00	
425a	" "	550.00	
427	" "	7,000.00	
427a	" "	575.00	
429	" "	7,000.00	
431	" "	7,000.00	
433	" "	7,000.00	
435	" "	7,000.00	
437	" "	7,000.00	
439	" "	7,000.00	
441	" "	7,000.00	
443	" "	7,000.00	
445	" "	7,000.00	
447	" "	7,000.00	
449	" "	7,000.00	
451	" "	7,000.00	
453	" "	7,000.00	
	Carried forward	$1,253,750.00	$1,704,000.00
21	Brought forward	$1,253,750.00	$1,704,000.00
834–840	Tenth Ave., with old bldgs	45,000.00	
842–848	Plot, Tenth Ave., with old buildings	30,000.00	
434	W. 56th St., with old bldg	7,000.00	
436	" vacant lot	7,000.00	
438	" "	7,000.00	
440	" with old bldg	7,000.00	
446	" vacant lot	5,000.00	
450	" "	7,000.00	
	Block 1084.		
831	Tenth Ave., subject to lease	12,000.00	
833	" "	8,500.00	
835	" "	8,500.00	
837	" "	8,500.00	
839	" "	8,500.00	
841	" "	8,500.00	
843	" "	8,500.00	
845	" "	8,500.00	
847	" "	8,500.00	
849	" " $12,000		
	Less value of gore hereafter appraised 750	11,250.00	
503	W. 55th St., subject to lease	5,000.00	
505/507	" "	12,000.00	
509	" "	6,000.00	

511	W. 55th St., subject to lease.....	$6,000.00	
513	" "	6,000.00	
515	" with old bldg.....	5,000.00	
517	" "	5,000.00	
519	" subject to lease	5,000.00	
521, 523, 525	" " " 3 vacant lots.....	15,000.00	
	Carried forward.....	$1,525,000.00	$1,704,000.00
22	Brought forward.....	$1,525,000.00	$1,704,000.00
527, 529, 531	W. 55th St. " " subject to lease.....	15,000.00	
533, 535	" " "	9,000.00	
537, 539	" " "	9,000.00	
541	" vacant.....	4,500.00	
543	" "	4,500.00	
792, 794, 796, 798	Eleventh Ave. plot about 3½ vacant lots..... ..	22,000.00	
800	Eleventh Ave., subject to lease.....	6,250.00	
802–804	" "	14,000.00	
545, 547, 549, 551	W. 55th St., " " " subject to lease.....	35,000.00	
546, 548, 550	W. 56- St., " "		
544	" vacant.....	4,500.00	
542	" "	4,500.00	
540	" "	4,500.00	
538	" subject to lease.....	4,500.00	
536	" "	4,500.00	
534	" "	4,500.00	
532	" vacant.....	4,500.00	
530	" "	4,500.00	
528	" subject to lease.....	5,000.00	
526	" vacant.....	5,000.00	
524	" "	5,000.00	
522	" "	5,000.00	
520	" "	5,000.00	
518	" "	5,000.00	
516	" "	5,000.00	
514	" "	5,000.00	
	Carried forward.....	$1,720,250.00	$1,704,000.00

23	Brought forward.....	$1,720,250.00	$1,704,000.00
512	W. 56 St. subject to lease.....	6,000.00	
510	" "	6,000.00	
508	" vacant.....	6,000.00	
506	" "	6,000.00	
504	" subject to lease.....	6,500.00	
502	" "	5,000.00	
	Block 1085.		
806	Eleventh Ave., with gore, subject to lease.....	9,000.00	
	Block 1103.		
793	Eleventh Ave., with gore, vacant...	10,000.00	
795	" subject to lease.....	6,000.00	
797	Eleventh Ave.....		
799	"		
801	"	" 22,500.00	
602 & 602a	W. 56th St.		
604 } 604a }	W. 56th St., vacant.....	3,000.00	
606 } 606a }	" "	3,000.00	
608	" "	3,000.00	
610	" with gore irregular, vacant.....	1,200.00	
	Block 1104.		
	Northwest corner 56th Street and Eleventh Ave., vacant.....	14,000.00	
			$1,827,450.00
			$3,531,450.00

7. Parcels of land of irregular shape known as the Cozine Gores, and immediately adjoining certain lots of the Cozine Farm, being real property devised by the fourth clause of the third codicil of the will of William B. Astor:

	Property at the southwest corner of 10th Avenue and 56th Street, described in		
24	Brought forward.....		$3,531,450.00
	the deed from Livingston Livingston, referee, to William B. Astor, dated October 27, 1864, recorded in New York County Liber 921 of Conveyances, page 183.....	$750.00	

Property on the northerly side of West 54th Street, distant 425 feet eastwardly from 9th Avenue described in a deed from Jonas Sparks and wife to William B. Astor, dated May 22, 1863, and recorded in New York County in Liber 876 of Conveyances, page 392	$7,400.00	
Property on the northerly side of West 54th Street commencing 350 feet eastwardly from 9th Avenue described in a deed from Peter B. Amory and wife to William B. Astor, dated April 15, 1863, and recorded in New York County in Liber 876 of Conveyances, page 390	13,200.00	
		$21,350.00

8. Real estate held after foreclosure by the trustees of the trust created by William B. Astor for the benefit of Laura Astor for life, with power to appoint, by deed dated the 28th day of October, 1865:

57 East 120th Street, lot and b'ld'g	10,000.00
Gross real property	$3,526,800.00

25 *Personal Property.*

1. Individual estate of Laura Astor Delano within the State of New York at the time of her death:

397 Shares N. Y. C. & H. R. R. Co. stock, par value $100, at 156¼	$62,031.25	
Bond of Julius Israel secured by mortgage on premises 143 Delancey Street, interest at 4½ % May and November 1.	20,000.00	
Accrued interest thereon	107.50	
Bond of Ray L. Berger, secured by mortgage on 85 Henry Street, interest 5 %, May and November 1	9,000.00	
Accrued interest thereon	53.75	
Money on deposit in Union Trust Company, with interest to June 15, 1902	971.39	
Accrued income to June 15, 1902, on trust created by deed of September 10, 1844	12,818.49	
Accrued income to June 15, 1902, on trust created by deed of September 6, 1849	1,308.57	

	Accrued income to June 15, 1902, on trust created by deed of October 28, 1865.....	$4,750.75	
	Accrued income to June 15, 1902, on trust created by fifth article of the will of William B. Astor.....	8,657.54	
			$119,699.24
26	Brought forward		$119,699.24
	2. Property transferred by William B. Astor to James Gallatin and John J. Astor, Jr., for the benefit of Laura Astor Delano for life, with power of appointment, by deed dated Septembr 6, 1849:		
	Bond of Jacob Lissner secured by mortgage on premises 722 Columbus Avenue	$15,000.00	
	Bond of Sarah J. O'Neill, secured by mortgage on premises 67 Irving Place.	15,000.00	
	Bond of Harris D. Colt, secured by mortgage on premises East 61st Street.....	20,000.00	
			50,000.00
	3. Personal property transferred by John Jacob Astor and William B. Astor to James Gallatin and John Jacob Astor the younger, as trustees for the benefit of Laura Astor Delano, for life, with power of appointment, by deed dated September 10, 1844:		
	Bond of Medora S. Bartlett, secured by mortgage on premises 497 Third Avenue	$12,000.00	
	Bond of Richard Irvin, secured by mortgage on premises 12 West 36th Street.	40,000.00	
	Bond of P. A. Grivet, secured by mortgage on premises 236 East 42d Street	12,500.00	
	Carried forward	$64,500.00	$169,699.24
27	Brought forward.....	$64,500.00	$169,699.24
	Bond of Herman Queller, secured by mortgage on premises 2169 First Avenue	20,000.00	
	Bond of Annie N. Harris, secured by mortgage on premises situated on Second Avenue near 37th Street.....	14,500.00	
	Bond of Joseph A. Kehoe, secured by mortgage on 131 West 93d Street.....	3,000.00	

Bond of Cornelia K. Averill, secured by mortgage on premises on West 41st St. near 8th Avenue	$40,000.00	
Cash uninvested	1,169.46	
		$143,169.46

4. Property transferred by William B. Astor to John Jacob Astor, Jr., William Astor and George De Forest Lord, as trustees for the benefit of Laura Astor Delano for life, with power of appointment by deed dated October 28, 1865:

Bond of Joel Hyams, secured by mortgage on premises 23–25 Greene Street.	$55,000.00	
Bond of Jonas Weil, secured by mortgage on premises 36 East 75th Street.	30,000.00	
Bond of Joseph A. Kehoe, secured by mortgage on premises 131 West 93d Street	11,000.00	
Carried forward	$96,000.00	$312,868.70
22 Brought forward	$96,000.00	$312,868.70
Bond of James M. Townsend, Jr., secured by mortgage on premises West 75th Street	17,000.00	
Bond of Henry W. Schmidt, secured by mortgage on premises on southwest corner of 49th Street and 9th Avenue.	17,000.00	
Bond of Frederick Meyer, secured by mortgage on premises on 25th Street near Second Avenue	18,000.00	
Bond of Dometille Denison, secured by mortgage on premises on Albany Road	10,000.00	
Uninvested cash	27,726.24	
		185,746.24

5. Personal property belonging to the trust estate created by the fifth clause of the will of William B. Astor:

$15,000, New York City, 3½%, consols, gold stock, due Oct. 1, 1915, coupons, at 107	$16,050.00	
$49,700, New York City, 3½% consols, gold stock, corporate registered stock, due October 1, 1918, at 108½	53,738.12	
Bond of Redmond Forrestal, secured by mortgage	6,000.00	

Bond of John L. Logan, secured by mortgage	$12,000.00	
Bond of Mary L. Cormack, secured by mortgage	12,000.00	
Carried forward	$99,788.12	$498,614.94
29 Brought forward	$99,788.12	$498,614.94
Bond of Mary L. Cormack, secured by mortgage	22,000.00	
Bond of Jules Vatable, secured by mortgage	12,000.00	
Bond of Jules Vatable, secured by mortgage	3,000.00	
Bond of William H. Post, secured by mortgage	12,000.00	
Uninvested cash	13,670.76	
		162,458.88
Gross personal estate		$661,073.82
Total value of real estate within the State of New York		3,562,800.00
Total value of person- estate within the State of New York		661,073.82
Total		$4,223,873.82

Personal estate of Laura Astor Delano not within the State of New York at the time of her death.

Bonds secured by mortgages on property in this State, amounting in the aggregate to	$890,588.75	
Accrued interest thereon	7,354.44	
Bonds of railroad corporations incorporated under laws of other States, of the par value of $133,000, market value	146,015.00	
Harlem R. & Portchester, 1st mortgage bonds, of the par value of $25,000, market value	25,000.00	
Carried forward	$1,068,958.19	
30 Brought forward	$1,068,958.19	
$10,000, Jersey City, 6 % water bonds, 1909, market value	11,200.00	
$10,000, Jersey City, 5 % assessment bonds, September, 1923, market value.	11,800.00	

3,065 shares, Morris & Essex R. R. Co., market value	301,136.25	
$8,000, New York City, 3-3/10 % stock, market value	8,000.00	
On deposit with Hottinguer & Company, Paris, France, cash and securities	239,827.00	
Cash without the State over and above debts	75,897.71	
		$1,716,819.15
Personal property belonging to the trust estate created by the special English will and codicils of William B. Astor held in Great Britain:		
£26,625-5-8, invested in British consols, which, at $4.86 to the £, equals		129,398.86
Total value of personal estate without the State		$1,846,218.01

Third. I further report that the following deductions should be made:

1. From the gross value of the individual real estate and the gross value of the individual personal estate within the State of New York		$699,699.24
31 Brought forward		$699,699.24
The proportionate amount of Executors' commissions	$73,036.35	
Expenses of administration	75,000.00	
	$148,036.35	
Total deductions		42,888.00
Leaving a net real and personal estate within the State of		$656,811.24
2. From the gross value of the personal property transferred by said deed of September 10, 1844		143,169.46
Trustees' commissions	$3,243.38	
Expenses of administration	5,000.00	
Total deductions		8,243.38
Leaving a net personal estate of		$134,926.08
3. From gross value of personal property transferred by deed dated September 6, 1849		$50,000.00
Trustees' Commissions	$690.00	
Expenses of administration	500.00	
Total deductions		1,190.00
Leaving a net personal estate of		$48,810.00

4. From gross value of real and personal property transferred by deed dated October 28, 1865		$195,746.24
Trustees' commissions	$4,294.92	
Expenses of administration	5,000.00	
Total deductions		9,294.92
Leaving a net estate of		$186,451.32

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5. From gross value of real and personal property held by trust created by fifth clause of the will of William B. Astor		$405,458.88
One-half trustees' commissions	$6,366.79	
Expenses of administration	5,000.00	
Total deductions		11,366.79
Leaving a net real and personal estate of		$394,092.09

Fourth. I further report that Laura Astor Delano died on the 15th day of June, 1902, at Geneva, in the Republic of Switzerland, being at the time of her death a non-resident of this State; that said decedent left a last will and testament bearing date the 18th day of October, 1900, with a codicil thereto bearing date the 8th day of April, 1901, copies of which are hereto annexed, which were duly admitted to probate in the Surrogates' Court of the County of New York on the 13th day of October, 1902, as a will of a non-resident, and letters testamentary were issued to the following as executors:

John Jacob Astor, 23 West 26th Street, New York City;
Warren Delano, Jr., 1 Broadway, New York City;
Franklin B. Lord, 49 Wall Street, New York City.

Fifth. I further report that the said Laura Astor Delano, in and by her last will and testament and codicil thereto, exercised various powers of appointment which were created as follows:

1. A power of appointment created by the tenth article of the will of John Jacob Astor and the fifth article of the will of William B. Astor (copies of said clauses are incorporated in the testimony annexed hereto).

2. A power of appointment created by the second clause of the fifth codicil of the will of William B. Astor (a copy of said clause is incorporated in the testimony annexed hereto).

33 3. A power of appointment created by the fifth clause of the will of William B. Astor (a copy of said clause is incorporated in the testimony hereto annexed).

4. A power of appointment created by William B. Astor by deed dated September 30, 1848 (a copy of said deed is hereto annexed).

5. A power of appointment created by William B. Astor by deed dated September 10, 1844 (a copy of said deed is hereto annexed.)

6. A power of appointment created by the fourth clause of the third codicil of the will of William B. Astor (a copy of said clause is incorporated in the testimony hereto annexed).

7. A power of appointment created by William B. Astor by deed dated October 28, 1865 (a copy of said deed is hereto annexed).

8. A power of appointment created by William B. Astor by deed dated September 6, 1819 (a copy of said deed is hereto annexed).

9. A power of appointment created by the special English will and codicils of William B. Astor (copies of which are hereto annexed).

Sixth. I further report that in and by the terms of the said will and codicil the said Laura Astor Delano disposed of her individual estate within the State of New York, as follows :

Laura Astor Chanler, great-great-niece of testratrix.... $10,000.00

34 The residue of her individual estate remaining after the above bequest, to

John Hubert de Stuers,
Margaret de Stuers and
Hubert de Stuers, grandnephews and grandniece of testatrix,
or to
John Armstrong Chanler,
Winthrop Astor Chanler,
Elizabeth Winthrop Chapman,
William Astor Chanler,
Lewis Stuyvesant Chanler,
Margaret Livingston Chanler,
Robert Winthrop Chanler and
Alida Beekman Emmet, grandnephews and grandnieces of testatrix,
or to
The Union Trust Company, as trustee for the said
John Armstrong Chanler,
Winthrop Astor Chanler,
Elizabeth Winthrop Chapman,
William Astor Chanler,
Lewis Stuyvesant Chanler,
Margaret Livingston Chanler,
Robert Winthrop Chanler and
Alida Beekman Emmet, and their children. } $646,811.24

35 Seventh. I further report that in and by the terms of said will and codicil, the said Laura Astor Delano appointed the property subject to power of appointment created by the tenth article of the will of John Jacob Astor, and by the fifth article of the will of William B. Astor to

John Hubert de Stuers, Margaret de Stuers, and Hubert de Stuers, grandnephews and grandniece of said Laura Astor Delano, or to John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet, also grandnephews and grandnieces of said Laura Astor Delano.	$601,000.00

36 Eighth. I further report that in and by the terms of the said will and codicil, the said Laura Astor Delano appointed the property subject to power of appointment created by the second clause of the fifth codicil of the will of William B. Astor, to

John Hubert de Stuers, Margaret de Stuers, and Hubert de Stuers, grandnephews and grandniece of Laura Astor Delano, or to John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet, great nephews and great nieces of Laura Astor Delano, or to The Union Trust Company, as trustee for the said John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler and Alida Beekman Emmet, and their children.	$230,000.00

37 Ninth. I further report that in and by the terms of the said will and codicil, the said Laura Astor Delano appointed the property which is subject to the power of appointment created by the fifth clause of the will of William B. Astor, to

John Hubert de Stuers, Margaret de Stuers, and Hubert de Stuers, grandnephews and grandniece of the said Laura Astor Delano, or to John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet, great nephews and great nieces of Laura Astor Delano, or to The Union Trust Company, as trustee for the said John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler and Alida Beekman Emmet, and their children.	$394,092.09

Tenth. I further report that in and by the terms of the said will and codicil, the said Laura Astor Delano appointed the property which is subject to power of appointment created by William B. Astor by deed dated September 30, 1848, to

Arthur Astor Carey, nephew of said Laura Astor Delano	$50,000.00

38 Eleventh. I further report that in and by the terms of the said will and codicil, said Laura Astor Delano appointed the real and personal property which is subject to power of appointment created by William B. Astor by deed dated September 10, 1844, in equal shares, to

John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet, great nephews and great nieces of said Laura Astor Delano	$1,962,376.08

Twelfth. I further report that in and by the terms of said will and codicil, the said Laura Astor Delano appointed the real estate and gores which were subject to the power of appointment created

by the fourth clause of the third codicil of the will of William B. Astor, in equal shares, to

John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet, great nephews and great nieces of said Laura Astor Delano.	$21,350.00

39 Thirteenth. I further report that in and by the terms of said will and codicil, the said Laura Astor Delano appointed the property which is subject to the power of appointment created by William B. Astor by deed dated October 28, 1865, to

John Hubert de Stuers, Margaret de Stuers, and Hubert de Stuers, great nephews and great niece of Laura Astor Delano, or to John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet, great nephews and great nieces of said Laura Astor Delano, or to The Union Trust Company, as trustee for the said John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet (great nephews and great nieces of said Laura Astor Delano) and their children.	$186,451.32

Fourteenth. I further report that in and by the terms of the said will and codicil the said Laura Astor Delano appointed the property subject to the power of appointment created by William B. Astor by deed dated September 6, 1849, to

Arthur Astor Carey, nephew of said Laura Astor Delano... $48,810.00

40 Fifteenth. I further report that all the persons interested in this estate are of full age and of sound mind, except that Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler, Dorothy Chanler, Lewis Stuyvesant Chanler, Jr., Alida Chanler, William Astor Chanler, second, Elizabeth Winthrop Emmet, Margaret Chanler Emmet, Christopher Temple Emmet, Jr., Hester Alida Emmet, and Chanler Armstrong Chapman, are infants whose interest in remainder herein is taxed against the Union Trust Company as trustee of the trusts created during the lifetime of the parents of said infants with remainders to the said infants; and John Armstrong Chanler, who has been represented herein by Thomas T. Sherman, as committee of his property.

Sixteenth. I further report that the following appearances were made before me in this proceeding:

Hon. Edward H. Fallows, Attorney for State Comptroller;

Roosevelt & Kobbe, Esqs., Attorneys for Arthur Astor Carey;

Henry De Forest Baldwin, Esq., Attorney for Franklin B. Lord;

Howard Mansfield, Esq., Attorney for John Hubert de Stuers, Margaret de Stuers and Hubert de Stuers;

Evarts, Tracey & Sherman, Esqs., Attorneys for Thomas T. Sherman, as Committee of John Armstrong Chanler;

Morris, Sentell & Main, Esqs., Attorneys for Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler and Alida Beekman Emmet;

Coleman E. Kissam, Esq., Attorney for Franklin B. Lord and Lucius H. Beers, as trustees, and also for Robert W. Gillespie-
41 Stainton, Franklin B. Lord and Lucius H. Beers, trustees;

Emmet & Robinson, Esqs., Attorneys for Franklin B. Lord, Edmund L. Baylies and the New York Life Insurance & Trust Company, as trustee under the will of William B. Astor;

Peckham, Miller & King, Esqs., Attorneys for Union Trust Company, as trustee under the will of Laura Astor Delano.

Seventeenth. I further report that I appraised all the individual estate within the State of New York of the said Laura Astor Delano, deceased, at its fair market value on June 15th, 1902, the date of her death, as follows:

Laura Astor Chanler, great-great-niece of Laura Astor Delano, Cash legacy.....	$10,000.00
John Hubert de Stuers,	
Margaret de Stuers, and	
Hubert de Stuers, great nephews and great niece of Laura Astor Delano,	
or	
John Armstrong Chanler,	
Winthrop Astor Chanler,	
Elizabeth Winthrop Chapman,	
William Astor Chanler,	

Lewis Stuyvesant Chanler,
Margaret Livingston Chanler,
Robert Winthrop Chanler, and
Alida Beekman Emmet, great nephews and great nieces of Laura Astor Delano,

or

The Union Trust Company, as trustee for the said
John Armstrong Chanler,
Winthrop Astor Chanler,
42 Elizabeth Winthrop Chapman,
William Astor Chanler,
Lewis Stuyvesant Chanler,
Margaret Livingston Chanler,
Robert Winthrop Chanler, and
Alida Beekman Emmet, and their children,

Interest in the residuary real and personal estate of Laura Astor Delano within the State of New York, including therein the value of all life estates and remainders created by the said will..... $646,811.24

Eighteenth. I further report that I appraised all property with respect to which the said Laura Astor Delano exercised powers of appointment given to her as aforesaid, subject to tax herein, at its fair market value on the 15th day of June, 1902, the date of her death, as follows:

John Hubert de Stuers,
Margaret de Stuers, and
Hubert de Stuers, great nephews and great niece of Laura Astor Delano,

or

John Armstrong Chanler,
Winthrop Astor Chanler,
Elizabeth Winthrop Chapman,
William Astor Chanler,
Lewis Stuyvesant Chanler,
Margaret Livingston Chanler,
Robert Winthrop Chanler, and
Alida Beekman Emmet, great nephews and great nieces of Laura Astor Delano,

Interest in the property appointed by Laura Astor Delano by virtue of the power of appointment created by the tenth article of the will of John Jacob Astor, and by the fifth article of the will of William B. Astor..... $601,000.00

43 John Hubert de Stuers,
Margaret de Stuers, and
Hubert de Stuers, great nephews and great niece of Laura Astor Delano,

or
John Armstrong Chanler,
Winthrop Astor Chanler,
Elizabeth Winthrop Chapman,
William Astor Chanler,
Lewis Stuyvesant Chanler,
Margaret Livingston Chanler,
Robert Winthrop Chanler, and
Alida Beekman Emmet, great nephews and great nieces of Laura Astor Delano,

or
The Union Trust Company, as trustee for the said
John Armstrong Chanler,
Winthrop Astor Chanler,
Elizabeth Winthrop Chapman,
William Astor Chanler,
Lewis Stuyvesant Chanler,
Margaret Livingston Chanler,
Robert Winthrop Chanler and
Alida Beekman Emmet, and their children,

Interest in the property appointed by Laura Astor Delano by virtue of the power of appointment created by the second clause of the fifth codicil of the will of William B. Astor, including the value of all life estates and remainders created by said will of Laura Astor Delano..... $230,000.00

Interest in the property appointed by Laura Astor Delano by virtue of the power of appointment created by the fifth clause of the will of William B. Astor, including the value of all life estates and remainders created by said will of Laura Astor Delano..... 394,092.09

44 Interest in the property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated October 28, 1865, including all life estates and remainders created by said will of Laura Astor Delano..... 186,451.32

Arthur Astor Carey, nephew of said Laura Astor Delano,

Interest in the property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 30, 1848..... 50,000.00

Interest in the property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 6, 1849..... 48,810.00

John Armstrong Chanler, great nephew of said Laura Astor Delano,

One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844..... 245,297.01

One-eighth interest in parcels of real estate known as the Cozine Gores which were appointed by said Laura Astor Delano by virtue of the power of appointment created by the fourth clause of third codicil of the will of William B. Astor..... 2,668.75

Winthrop Astor Chanler, great nephew of said Laura Astor Delano,

One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844..... 245,297.01

One-eighth interest in parcels of real estate known as the Cozine Gores which were appointed by said Laura Astor Delano by virtue of the power of appointment created by the fourth clause of the third codicil of the will of William B. Astor.. 2,668.75

Elizabeth Winthrop Chapman, great niece of said Laura Astor Delano,

One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844..... 245,297.01

One-eighth interest in parcels of real estate known as the Cozine Gores which were appointed by said Laura Astor Delano by virtue of the power of appointment created by the fourth clause of the third codicil of the will of William B. Astor..... 2,668.75

William Astor Chanler, great nephew of the said Laura Astor Delano,

One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844..... 245,297.01

One-eighth interest in parcels of real estate known as the Cozine Gores which were appointed by said Laura Astor Delano by virtue of the power of appointment created by the fourth clause of the third codicil of the will of William B. Astor..... 2,668.75

Lewis Stuyvesant Chanler, great nephew of said Laura Astor Delano,

One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844 ..... 245,297.01

46 One-eighth interest in parcels of real estate known as the Cozine Gores which were appointed by said Laura Astor Delano by virtue of the power of appointment created by the fourth clause of the third codicil of the will of William B. Astor.. 2,668.75

Margaret Livingston Chanler, great-niece of said Laura Astor Delano,

One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844..... 245,297.01

One-eighth interest in parcels of real estate known as the Cozine Gores which were appointed by said Laura Astor Delano by virtue of the power of appointment created by the fourth clause of the third codicil of the will of William B. Astor..... .. 2,668.75

Robert Winthrop Chanler, great nephew of said Laura Astor Delano,

One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844 ..... 245,297.01

One-eighth interest in parcels of real estate known as the Cozine Gores which were appointed by said Laura Astor Delano by virtue of the power of appointment created by the fourth clause of the third codicil of the will of William B. Astor..... 2,668.75

Alida Beekman Emmet, great niece of said Laura Astor Delano,

47 One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844..... 245,297.01

One-eighth interest in parcels of real estate known as the Cozine Gores which were appointed by said Laura Astor Delano by virtue of the power of appointment created by the fourth clause of the third codicil of the will of William B. Astor..... 2,668.75

Nineteenth: I further report that the personal property owned by said Laura Astor Delano and not within the State of New York

at the time of her death, and also the property disposed of by the special English will of William B. Astor, being in the hands of the trustee in England at the date of her death, are not subject to a transfer tax.

Respectfully submitted,

ROBERT MAZET,
Appraiser.

Dated, New York City, December 9th, 1903.

48 *Order Fixing Tax Read by Respondent.*

At a Surrogates' Court held in and for the County of New York, at the County Court House in the City of New York, on the 11th Day of December, 1903.

Present: Hon. Abner C. Thomas, Surrogate.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

On reading the report of the Appraiser, Robert Mazet, Esquire, duly filed herein on the 9th day of December, 1903, whereby it appears that said decedent died on the 15th day of June, 1902, at Geneva, in the Republic of Switzerland, being claimed to be at the time of her death a non-resident of this State, and upon motion of Henry de Forest Baldwin, Esquire, attorney for the petitioners,

It is ordered and adjudged that the cash value of the property referred to in said report, the transfer of which is subject to the tax imposed by the act in relation to taxable transfers of property, and the tax to which said transfers are liable, is as follows:

49

Beneficiary.	Cash value of interest.	Tax assessed thereon.
Laura Astor Chanler.....	$10,000.00	$500.00
John Hubert de Stuers, Margaret de Stuers and Hubert de Steurs, or John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler and Alida Beekman Emmet, or The Union Trust Company, as trustee for said John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, and their children,		

	Beneficiary.	Cash value of interest.	Tax assessed thereon.
	Interest in residuary real and personal estate of Laura Astor Delano within the State of New York, including therein the value of all life estates and remainders created by said will.....	$646,811.24	$32,340.56
50	John Hubert de Stuers, Margaret de Stuers and Hubert de Stuers, or John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler and Alida Beekman Emmet.		
	Interest in property appointed by Laura Astor Delano by virtue of the power of appointment created by the 10th article of the will of John Jacob Astor and the 5th article of the will of William B. Astor.....	601,000.00	30,050.00
	John Hubert de Stuers, Margaret de Stuers and Hubert de Stuers, or John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Winthrop Chanler, and Alida Beekman Emmet, or The Union Trust Company, as trustee for the said John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet, and their children.		

	Beneficiary.	Cash value of interest.	Tax assessed thereon.
51	Interest in property appointed by Laura Astor Delano by virtue of the power of appointment created by the 2d clause of the 5th codicil of the will of William B. Astor, including the value of all life estates and remainders created by the will of Laura Astor Delano.....	$230,000.00	$11,500.00
	Interest in property appointed by Laura Astor Delano by virtue of the power of appointment created by the 5th clause of the will of William B. Astor, including the value of all life estates and remainders created by said will of Laura Astor Delano.....	394,092.09	19,704.60
	Interest in property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated October 28, 1865, including all life estates and remainders created by the will of Laura Astor Delano.....	186,451.32	9,322.66
	Arthur Astor Carey:		
	Interest in property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 30, 1848..	50,000.00	2,500.00
	Interest in property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 6, 1849..	48,810.00	2,440.50

	Beneficiary.	Cash value of interest.	Tax assessed thereon.
52	John Armstrong Chanler:		
	One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844..	$245,297.01	$12,264.85
	One-eighth interest in parcels of real estate, known as the Cozine Gores, which were appointed by said Laura Astor Delano, by virtue of the power of appointment created by the 4th clause of the 3rd codicil of the will of William B. Astor.....	2,668.75	133.43
	Winthrop Astor Chanler:		
	One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844..	245,297.01	12,264.85
	One-eighth interest in parcels of real estate, known as the Cozine Gores, which were appointed by said Laura Astor Delano, by virtue of the power of appointment created by the 4th clause of the 3rd codicil of the will of William B. Astor...	2,668.75	133.43
53	Elizabeth Winthrop Chapman:		
	One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844..	245,297.01	12,264.85
	One-eighth interest in parcels of real estate, known as the Cozine Gores, which were appointed by said Laura Astor Delano, by virtue of the power of appointment created by the 4th clause of the 3rd codicil of the will of William B. Astor.....	2,668.75	133.43

	Beneficiary.	Cash value of interest.	Tax assessed thereon.
	William Astor Chanler:		
	One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844..	$245,297.01	$12,264.85
	One-eighth interest in parcels of real estate, known as the Cazine Gores, which were appointed by said Laura Astor Delano, by virtue of the power of appointment created by the 4th clause of the 3rd codicil of the will of William B. Astor.....	2,668.75	133.43
54	Lewis Stuyvesant Chanler:		
	One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844..	245,297.01	12,264.85
	One-eighth interest in parcels of real estate, known as the Cozine Gores, which were appointed by said Laura Astor Delano, by virtue of the power of appointment created by the 4th clause of the 3rd codicil of the will of William B. Astor.....	2,668.75	133.43
	Margaret Livingston Chanler:		
	One eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844.....	245,297.01	12,264.85
	One-eighth interest in parcels of real estate, known as the Cozine Gores, which were appointed by said Laura Astor Delano, by virtue of the power of appointment created by the 4th clause of the 3rd codicil of the will of William B. Astor.....	2,668.75	133.43

	Beneficiary.	Cash value of interest.	Tax assessed thereon.
55	Robert Winthrop Chanler:		
	One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844	$245,297.01	$12,264.85
	One-eighth interest in parcels of real estate, known as the Cozine Gores, which were appointed by said Laura Astor Delano, by virtue of the power of appointment created by the 4th clause of the 3rd codicil of the will of William B. Astor	2,668.75	133.43
	Alida Beekman Emmet:		
	One-eighth interest in real and personal property appointed by Laura Astor Delano by virtue of the power of appointment created by William B. Astor by deed dated September 10, 1844	245,297.01	12,264.85
	One-eighth interest in parcels of real estate, known as the Cozine Gores, which were appointed by said Laura Astor Delano, by virtue of the power of appointment created by the 4th clause of the 3rd codicil of the will of William B. Astor	2,668.75	133.43

56 And, on motion of the Surrogate, it is

Further ordered that all questions as to the taxability of personal property owned by said Laura Astor Delano or subject to her power of appointment, which personal property was not within the State of New York at the time of her death are hereby reserved until the Surrogate has determined the question of fact as to whether she was or was not a resident of this State at the time of her death and this matter is remitted to the Appraiser to take further evidence as to said question of fact, and to report the same to the Surrogate with his opinion.

ABNER C. THOMAS, *Surrogate.*

Notice of Appeal to Surrogate by Adults.

Surrogates' Court, County of New York.

In the Matter of the Transfer Tax on the Property Transferred and Appointed by the Last Will and Testament of LAURA ASTOR DELANO, Deceased.

Please to take notice that John Hubert de Stuers, Margaret de Stuers, Hubert de Stuers, John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler,
57 Robert Winthrop Chanler, Alida Beekman Emmet and the Union Trust Company, as Trustee for the said John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, and their children and Arthur Astor Carey, are dissatisfied with the appraisement herein of the property, with respect to which the said Laura Astor Delano exercised certain powers of appointment created as follows:

1. A power of appointment created by William B. Astor by deed dated September 30, 1848.

2. A power of appointment created by William B. Astor by deed dated September 10, 1844.

3. A power of apointment created by William B. Astor by deed dated October 28, 1865.

4. A power of appointment created by William B. Astor by deed dated September 6, 1849;

and hereby object to the report of the appraiser filed herein on the 9th day of December, 1903, and to the order or decree made herein fixing, assessing and determining the transfer tax in respect to the said property so appointed as aforesaid and entered herein on the 11th day of December, 1903, and hereby appeals to the Surrogate from the said appraisal and said assessment and determination of said tax, and from the said order or decree.

The grounds upon which said appeal is taken are:

I. That Article X of Chapter 908, Laws 1896, and the amendments thereto entitled Taxable Transfers, does not confer upon the Surrogates' Court of the County of New York jurisdiction over the property appointed to the appellants attempted to be taxed in this proceeding.

II. That Chapter 284 of the Laws of 1897 does not apply
58 to the property of these appellants for the reason that said property was acquired by them under deeds made in the years 1844, 1848, 1849 and 1865.

III. That Chapter 284 of the Laws of 1897 is unconstitutional and void, under Section 24, Article III of the Constitution of the State of New York, in that it does not distinctly state the tax and object to which it is to be applied.

IV. That Article X of Chapter 908, Laws of 1896, and the amendments thereto, as applied to the rights and interests of these appellants, is unconstitutional and void under Section 6, Article I of the Constitution of the State of New York, which provides that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation.

V. That Article X of Chapter 908, Laws of 1896, and the amendments thereto, as applied to the rights and interests of the appellants herein, is unconstitutional and void and that it is repugnant to Section 10, Article I of the Constitution of the United States in that it impairs the obligation of contracts between William B. Astor and the appellants herein.

VI. That Article X of Chapter 908, Laws of 1896, and the amendments thereto, as applied to the rights and interests of the appellants, is unconstitutional and void as being repugnant to Section I of the XIV Amendment of the Constitution of the United States in that it seeks to deprive citizens of property without due process of law, and to deny to persons affected thereby the equal protection of the laws.

VII. That such portions of the property transferred by said deeds of 1844, 1848, 1849 and 1865 as were, under the terms of any of said deeds granted to any of the said appellants on failure of ap-
59 pointment by said Laura A. Delano are not subject to any tax herein.

VIII. That if the property appointed to, or in trust for, any of the appellants herein under the terms of said deeds of 1844, 1848, 1849 and 1865, is held to be subject to a tax herein, such tax should be fixed with respect to the relationship of the appellants herein to William B. Astor and not with respect to their relationship to the said Laura Astor Delano.

Dated December 11, 1903.

ROOSEVELT & KOBBE,
Att'ys for Arthur Astor Carey.

MORRIS, SENTELL & MAIN,
Att'ys for Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet.

EVARTS, TRACY & SHERMAN,
Att'ys for Thos. T. Sherman, as Committee for John Armstrong Chanler.

HOWARD MANSFIELD,
Att'y for John Hubert de Stuers, Margaret de Stuers and Hubert de Stuers.

PECKHAM, MILLER & KING,
Att'y- for the Union Trust Co. as Trustee.

To the Clerk of the Surrogates' Court, New York County.
Edward H. Fallows, Att'y for Comptroller of the State of New York.
Henry de Forest Baldwin, Att'y for Exrs. of Laura A. Delano.

60 *Order Appointing Guardian of Laura Astor Chanler and Others.*

At a Surrogate's Court held in and for the County of New York, at Chambers thereof, in the County Court House, in the Borough of Manhattan, City of New York, on the 17 day of February, 1905.

Present: Hon. Frank T. Fitzgerald, Surrogate.

In the Matter of the Transfer Tax upon the Estate of LAURA A. DELANO, Deceased.

On reading and filing the annexed petitions of Rutherford Stuyvesant, both vertified the 29th day of January, 1904, whereby it appears to the satisfaction of this Court that said Rutherfurd Stuyvesant is the next friend of Chanler Armstrong Chapman, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler and Theodore Ward Chanler, infants, and that he has no interest, herein adverse to that of said infants, and is not entitled to share in the estate or fund in which said infants are interested; that said infants are under the age of fourteen years and have no general guardian, and that said infant Chanler Armstrong Chapman resides with his father John Jay Chapman, whose wife Elizabeth Winthrop Chapman is interested in this proceeding, and that said infants Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler and Theodore Ward Chanler reside with their
61 father Winthrop Astor Chanler, who is also interested in this proceeding, and that all of said infants are necessary parties to this proceeding and have been duly served with the notice of appraisement herein; and on reading and filing the annexed affidavit of John Jay Chapman, the father of said infant Chanler Armstrong Chapman, verified January 30, 1904, showing that he has knowledge of and approves of this application; and on reading and filing the annexed affidavit of Winthrop Astor Chanler, the father of said infants Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler and Theodore Ward Chanler, verified January 29, 1904, showing that he has knowledge of and approves of this appliction; and on reading and filing the annexed petition of Laura Astor Chanler, verified December 23rd, 1903, whereby it appears that the said Laura Astor Chanler is an infant over fourteen years of age and has no general guardian and that she resides with her father Winthrop Astor Chanler, who is also interested in this proceeding and that said infant Laura Astor Chanler is a necessary party to this proceeding and has been duly served with the notice of appraisement herein and praying for the appointment of Egerton L. Winthrop, Jr., as special guardian for her herein, and on reading and filing the annexed affidavit of Winthrop Astor Chan-

ler, the father of said infant Laura Astor Chanler, verified December 23, 1903, showing that he has knowledge of and approves of this application and that he has not influenced said infant Laura Astor Chanler in the choice of said Egerton L. Winthrop, Jr., as such special guardian; and on reading and filing the annexed consent and affidavit of Egerton L. Winthrop, Jr., Esq., counsellor at law of the City, County and State of New York, whereby it appears that he is a competent and proper person to protect the interests of said infants Chanler Armstrong Chapman, Beatrice Margaret
62 Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Laura Astor Chanler herein, and that he has no interest adverse to that of said infants and is not connected in business with the attorneys or counsel of any parties to this proceeding, nor with any of the parties to this proceeding; and on reading and filing the annexed notice of this motion for the appointment of said Egerton L. Winthrop, Jr., as special guardian for the infant Chanler Armstrong Chapman (said infant Chanler Armstrong Chapman being the only one of the above named infants who is within the State of New York) with proof of the due service thereof on said infant Chanler Armstrong Chapman and on Elizabeth Winthrop Chapman, mother of said infant, and with whom said infant resides and no one appearing in opposition hereto, now on motion of Alphonse Dession, attorney for the petitioner herein, it is

Ordered that said Egerton L. Winthrop, Jr., Esq., be and he hereby is appointed the special guardian of said infants Chanler Armstrong Chapman, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Laura Astor Chanler, to appear for and protect their interests in this proceeding.

FRANK T. FITZGERALD, *Surrogate.*

63 *Order Appointing Guardian of Elizabeth Winthrop Emmet and Others.*

At a Surrogate's Court held in and for the County of New York, at Chambers thereof, in the County Court House, in the Borough of Manhattan, City of New York, on the 2nd day of February, 1904.

Present: Hon. Frank T. Fitzgerald, Surrogate.

In the Matter of the Transfer Tax upon the Estate of LAURA A. DELANO, Deceased.

On reading and filing the annexed petition of Rutherford Stuyvesant, verified the 29th day of January, 1904, whereby it appears to the satisfaction of this Court that said Rutherfurd Stuyvesant is the next friend of Elizabeth Winthrop Emmet, Margaret Chanler Emmet, Christopher Temple Emmet, Jr., and Hester Alida Emmet,

infants, and has no interest herein adverse to that of said infants and is not entitled to share in the estate or fund in which said infants are interested; that said infants are each under the age of fourteen years and have no general guardian and that said infants reside with their father Christopher Temple Emmet, whose wife Alida Beekman Emmet is interested in this proceeding, and that said infants are necessary parties to this proceeding and have been duly served with the notice of appraisment herein; and on reading and filing the affidavit of Christopher Temple Emmet, the father of said infants, verified the 30th day of January, 1904, showing that he has knowledge of and approves of this application, and on reading and
64 filing the annexed consent and affidavit of Grenville T. Emmet, Esq., counsellor at law of the City, County and State of New York, whereby it appears that he is a competent and proper person to protect the interests of said infants herein and that he has no interest adverse to that of said infants and is not connected in business with the attorneys or counsel of any parties to this proceeding, nor with any of the parties to this proceeding, Now on motion of Alphonse Dession, attorney for said petitioner, it is

Ordered that said Grenville T. Emmet, Esq., be and he hereby is appointed the special guardian of said infants Elizabeth Winthrop Emmet, Margaret Chanler Emmet, Christopher Temple Emmet, Jr., and Hester Alida Emmet to appear for and protect their interests in this proceeding. FRANK T. FITZGERALD, *Surrogate.*

65 *Order Appointing Guardian of Dorothy Chanler and Others.*

At a Surrogate's Court held in and for the County of New York, at Chambers thereof, in the County Court House, in the Borough of Manhattan, City of New York, on the 17th day of February, 1904.

Present: Hon. Frank T. Fitzgerald, Surrogate.

In the Matter of the Transfer Tax upon the Estate of LAURA A. DELANO, Deceased.

On reading and filing the annexed petitions of Rutherford Stuyvesant, both verified the 29th day of January, 1904, whereby it appears to the satisfaction of this Court that said Rutherford Stuyvesant is the next friend of Dorothy Chanler, Lewis Stuyvesant Chanler, Junior, Alida Chanler and William Astor Chanler, second, infants, and that he has no interest herein adverse to that of said infants and is not entitled to share in the estate or fund in which said infants are interested; that said infants are under the age of fourteen years and have no general guardian, and that said infant Dorothy Chanler resides with her mother Julia Chanler, whose husband Robert Winthrop Chanler is interested in this proceeding, and that said infants Alida Chanler and William Astor Chanler, second, reside with their father Lewis Stuyvesant Chanler, who is interested in this proceeding, and that said infant Lewis Stuyvesant Chanler, Junior, resides in England, and that all of said infants are necessary parties to this proceeding and have been duly served with the notice of ap-
66 praisement herein; and on reading and filing the annexed affidavit of Robert Winthrop Chanler, the father of said infant

Dorothy Chanler, verified January 30, 1904, showing that he has knowledge of and approves of this application; and on reading and filing the annexed affidavit of Lewis Stuyvesant Chanler, the father of the infants Lewis Stuyvesant Chanler, Junior, Alida Chanler and William Astor Chanler, second, verified February 1, 1904, showing that he has knowledge of and approves of this application, and on reading and filing the annexed consent and affidavit of Bronson Winthrop, Esq., counsellor at law of the City, County and State of New York, whereby it appears that he is a competent and proper person to protect the interests of said infants Dorothy Chanler, Lewis Stuyvesant Chanler, Junior, Alida Chanler and William Astor Chanler, second, herein, and that he has no interest adverse to that of said infants and is not connected in business with the attorneys or counsel of any parties to this proceeding, nor with any of the parties to this proceeding; and on reading and filing the annexed notice of motion for the appointment of said Bronson Winthrop, as special guardian for the infants Alida Chanler and William Astor Chanler, second, said infants Alida Chanler and William Astor Chanler, second, being all of the above named infants who are within the State of New York,) with proof of the due service thereof on said infants Alida Chanler and William Astor Chanler, second, and on Alice Chanler, mother of said infants and with whom said infants reside, and no one appearing in opposition hereto.

Now on motion of Alphonse Dession, attorney for the petitioner herein, it is

Ordered that said Bronson Winthrop, Esq., be and he hereby is appointed the special guardian of said infants Dorothy Chanler, Lewis Stuyvesant Chanler, Junior, Alida Chanler and William Astor Chanler, second, to appear for and protect their interests in this proceeding. FRANK T. FITZGERALD, *Surrogate.*

67 *Notice of Appeal to Surrogate by Infants.*

Surrogates' Court, County of New York.

In the Matter of the Transfer Tax upon the Property Transferred and Appointed by the Last Will and Testament of LAURA ASTOR DELANO, Deceased.

Please to take notice, that Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman, by Egerton L. Winthrop, Jr., their special guardian; Elizabeth Winthrop Emmet, Mary Chanler Emmet, Christopher Temple Emmet, Junior, and Hester Alida Emmet, by Grenville T. Emmet, their special guardian; Dorothy Chanler, Lewis Stuyvesant Chanler, Junior, Alida Chanler and William Astor Chanler, Second, by Bronson Winthrop, their special guardian, are dissatisfied with the appraisement herein of the property passing under the last will and testament of Laura Astor Delano, and of the property with respect to which the said Laura Astor Delano exercised certain powers of appointment created as follows:

1. A power of appointment created by William B. Astor by deed dated September 10, 1844.

2. A power of appointment created by William B. Astor by deed dated October 28, 1865.

68 And hereby object to the report of the Appraiser filed herein on the 9th day of December, 1903, and to the order or decree made herein fixing, assessing and determining the transfer tax in respect to the said property so appointed as aforesaid and entered herein on the 11th day of December, 1903, and hereby appeal to the Surrogate from the said appraisal and said assessment and determination of said tax, and from the said order or decree.

The grounds upon which said appeal is taken are:

I. That Article X of Chapter 908, Laws of 1896, and the amendments thereto entitled Taxable Transfers, does not confer upon the Surrogates' Court of the County of New York jurisdiction over the property appointed to the appellants attempted to be taxed in this proceeding.

II. That Chapter 284 of the Laws of 1897 does not apply to the property of these appellants for the reason that said property was acquired by them under deeds made in the years 1844 and 1865.

III. That Chapter 284 of the Laws of 1897 is unconstitutional and void, under Section 24, Article III of the Constitution of the State of New York, in that it does not distinctly state the tax and object to which it is to be applied.

IV. That Article X of Chapter 908, Laws of 1896, and the amendments thereto, as applied to the rights and interests of these appellants, is unconstitutional and void under Section 6, Article I of the Constitution of the State of New York, which provides that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation.

V. That Article X of Chapter 908, Laws of 1896, and the
69 amendments thereto, as applied to the rights and interests of the appellants herein, is unconstitutional and void and that it is repugnant to Section 10, Article I of the Constitution of the United States in that it impairs the obligation of contracts between William B. Astor and the appellants herein.

VI. That Article X of Chapter 908, Laws of 1896, and the amendments thereto, as applied to the rights and interests of the appellants, is unconstitutional and void as being repugnant to Section 1 of the XIV Amendment of the Constitution of the United States in that it seeks to deprive citizens of property without due process of law, and to deny to persons affected thereby the equal protection of the laws.

VII. That such portions of the property transferred by said deeds of 1844 and 1865 as were, under the terms of any of said deeds granted to any of the said appellants on failure of appointment by said Laura A. Delano are not subject to any tax herein.

VIII. That if the property appointed to, or in trust for, any of the appellants herein under the terms of said deeds of 1844 and 1865, is held to be subject to a tax herein, such tax should be fixed with respect to the relationship of the appellants herein to William B. Astor

and not with respect to their relationship to the said Laura Astor Delano.

IX. That in respect to the property of the said Laura Astor Delano devised and bequeathed by her under her last will and testament, and in respect to the property appointed by said Laura Astor Delano under powers of appointment contained in the following instruments:

1. The second clause of the fifth codicil of the will of William B. Astor.

70 2. The fifth clause of the will of William B. Astor.

3. Deed of trust between William B. Astor and Laura A. Delano and others, dated October 28, 1865.

Which property was devised and bequeathed or appointed by said Laura Astor Delano pursuant to such powers to the Union Trust Company of New York, as trustee, in trust for John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler and Alida Beekman Emmet, during their respective lives, with remainder to their respective issues in equal shares, or in default of such issue then living to the then surviving issue of Margaret A. Chanler, the cash value of such life estates in said property, and the cash value of the remainders therein, should be determined separately and the amount of tax to which the said life estates and said remainders are respectively liable should be separately determined.

Dated September 12, 1904.

EGERTON L. WINTHROP, JR.,
Special Guardian for Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman.

GRENVILLE T. EMMET,
Special Guardian for Elizabeth Winthrop Emmet, Mary Chanler Emmet, Christopher Temple Emmet, Junior, and Hester Alida Emmet.

71 BRONSON WINTHROP,
Special Guardian for Dorothy Chanler, Lewis Stuyvesant Chanler, Junior, Alida Chanler and William Astor Chanler, Second.

To the Clerk of the Surrogates' Court, New York County.

Edward H. Fallows, Attorney for Comptroller of the State of New York.

Henry de Forest Baldwin, Attorney for the Executors of Laura A. Delano.

Morris, Sentell & Main, Attorneys for Winthrop Astor Chanler *et al.*

Evarts, Tracy & Sherman, Attorneys for Thomas T. Sherman, as Committee, etc.

Howard Mansfield, Attorney for John Hubert de Stuers *et al.*

Peckham, Miller & King, Attorneys for Union Trust Company.

72 *Order of Affirmance Appealed from.*

At a Surrogate's Court Held in and for the County of New York, at the County Court House, in the City of New York, on the 22nd Day of March, 1905.

Present: Hon. Frank T. Fitzgerald, Surrogate.

In the Matter of the Transfer Tax upon the Property Transferred and Appointed by the Last Will and Testament of LAURA ASTOR DELANO, Deceased.

John Hubert de Stuers, Margaret de Stuers, Hubert de Stuers, John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, and The Union Trust Company as Trustee for the said John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, and their children, Arthur Astor Carey, and the infants, Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman, by Egerton L. Winthrop, Jr., their special guardian; Elizabeth Winthrop Emmet, Mary Chanler Emmet, Christopher Temple Emmet, Jr., and Hester Alida Emmet, by Grenville T. Emmet, their special guardian; Dorothy
73 Chanler, Lewis Stuyvesant Chanler, Jr., Alida Chanler and William Astor Chanler, Second, by Bronson Winthrop, their special guardian, having appealed to the Surrogate's Court of New York County from an order entered in said Court on the 11th day of December, 1903.

And the said appeal having thereafter come on to be heard before this Court, and after hearing Messrs. Lucius H. Beers, of counsel for the appellants, and George M. Judd, Esq., of counsel for the respondent and due deliberation having been had,

Now, on motion of Edward H. Fallows, Esq., the attorney for the State Comptroller, respondent,

It is ordered and adjudged that the order appealed from be and the same hereby is affirmed.

Enter,

FRANK T. FITZGERALD, *Surrogate.*

Minutes of Hearing.

Surrogates' Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

Hearing Before Appraiser Robert Mazet, Room 1404, Home Life Building, 256 Broadway, Borough of Manhattan, City of New York, December 2d, 1903.

74 Appearances.

Hon. Edward H. Fallows (by G. M. Judd, Esq.), Attorney for State Comptroller.

Roosevelt & Kobbe, Esqs., Attorneys for Arthur Astor Carey.

Henry de Forest Baldwin, Esq., Attorney for executors.

Howard Mansfield, Esq., Attorney for John Hubert de Stuers, Margaret de Stuers and Hubert de Stuers.

Evarts, Tracy & Sherman, Esqs., Attorneys for Thomas T. Sherman, as committee of John Armstrong Chanler.

Morris, Sentell & Main, Esqs., Attorneys for Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler and Alida Beekman Emmet.

Coleman E. Kissam, Esq., Attorney for Franklin B. Lord and Lucius H. Beers, as trustees, and also for Robert W. Gillespie Stainton, Franklin B. Lord and Lucius H. Beers, trustees.

Emmet & Robinson, Esqs., Attorneys for Franklin B. Lord, Edmund L. Baylies and New York Life Insurance & Trust Company, as trustees under the will of William B. Astor.

Peckham, Miller & King, Esqs., Attorneys for Union Trust Company, as trustee under the will of Laura Astor Delano.

75 (Mr. Lucius H. Beers states that he is authorized to have noted on the record the appearances of the above named attorneys.)

Mr. MAZET: An order having been made in this proceeding by Honorable Abner C. Thomas, Surrogate, bearing date December 9th, 1902, staying all proceedings herein before the Appraiser pending appeal, and the matter having been appealed to the Court of Appeals and a decision having been rendered herein on the 24th day of November, 1903, sustaining the order of the Surrogate in this proceeding, but no order having yet been entered on the said decision or served on the Appraiser, it is hereby stipulated by all the interested parties that these proceedings may go on as though an order had been formally entered on said decision.

FRANKLIN B. LORD, called as a witness, being sworn, testified as follows:

Examined by Mr. BEERS:

Q. You are one of the executors of the will of Mrs. Laura Astor Delano?
A. Yes.
Q. Will you produce a copy of the will?
A. I produce a copy.

The copy of the will was offered in evidence by Mr. Beers received and marked Exhibit 1 of this date.

Q. Will you produce the letters testamentary that were issued to you under this will?
A. I will.

The letters testamentary on the estate of said Laura Astor Delano, deceased, were offered in evidence by Mr. Beers; received and marked Exhibit 2 of this date.

76 Q. Were you acquainted with Mrs. Laura Astor Delano in her life time?
A. I was.
Q. For how long before her death?
A. For a great many years; I should say for 25 years.
Q. Please state what knowledge you have with respect to the place of abode of Mrs. Laura Astor Delano at the time of her decease, and for—say—10 years prior to her death.
A. The last time I saw Mrs. Delano, I should say, was about 1889; after that time, I understood from hearsay and from mutual acquaintances and members of the family, that she was living at Monte Carlo. Since 1899 I corresponded with her regularly, and her letters have been dated at Monte Carlo during the winter months and from Geneva, Switzerland, during the summer.
Q. Can you state when and where she died?
A. She died, according to my advices, at Geneva.
Q. On what day?
A. On the fifteenth of June, 1902.
Q. Do you know whether Mrs. Delano died seized of any real property situate in the State of New York, and if so, please state where the property was situated?
A. She owned at the time of her death real estate on Fifth Avenue between 33rd and 34th Streets, Nos. 341, 343, 345 and 347 Fifth Avenue; and also No. 67 Third Avenue.
Q. Was that the only real property of which she died seized situated in the State of New York?
A. To the best of my knowledge.
Q. Did Mrs. Delano at the time of her death own any stocks in New York corporations, if so, please state what stocks, and what the market value was on the date of her death on the 15th of June, 1902?
A. She was the owner of 397 shares of stock of the New York Central & Hudson River Railroad Company of the par value of

$39,700, equivalent, at 156¼—which I believe was the market value on the day of her death—to $62,031.25.

Q. Were those the only stocks of New York corporations which she had at the time of her death, to the best of your information?

77 A. To the best of my knowledge.

Q. Did she have any moneys on deposit in the State of New York, and if so, please state to what amount?

A. She had $1,655.76 on deposit in the Union Trust Company in this city.

By Mr. JUDD:

Q. Was there any accrued interest on that deposit?

Mr. BEERS: We will have to compute that.

By Mr. BEERS:

Q. Did Mrs. Delano own any other securities than the stock of the New York Central Railroad to which you have referred, which securities were actually within the State of New York at the time of her death?

A. You mean bonds, the bonds being within this State?

Q. Yes, the securities themselves—the evidence of the debt being within this State.

A. She owned a bond for $9,000 secured by mortgage on 85 Henry Street; and a bond for $20,000, secured by mortgage on 143 Delancey Street.

Q. And those were the only securities the evidence of which was physically within the State of New York at the date of her death, to the best of your knowledge?

A. That is the fact.

Q. Please state the amount of the interest accrued and unpaid up to June 15th, 1902, on the bonds and mortgages to which you have referred.

A. The accrued interest on the $9,000 mortgage from May 1st, 1902, up to which time interest had been paid, to June 15th, 1902, amounts to $53.75. The accrued interest on the $20,000 mortgage from May 1st, the interest date, to June 15th, amounts to $107.50. In addition to the amount on deposit in the Union Trust Company, there was accrued interest on the deposit and other deposits which amounted on June 30th, to $971.39.

78 By Mr. MAZET:

Q. This interest was on some deposit that had been drawn out before the date of her death?

A. Yes.

Q. And that amount of $1,655 is the balance?

A. Yes.

By Mr. JUDD:

Q. How old was Mrs. Delano at the time of her death?

A. I think that Mrs. Delano was about 74 years old; she was married in 1844.

Q. How long before her death did she go to Monte Carlo, about?

A. My recollection is she had been there some time before 1890. Whether she had made it her home or whether she had merely visited Monte Carlo from time to time, I cannot say.

Q. From the time she left the United States prior to 1890, did she ever return to the United States?

A. No, I believe not.

Q. She remained continuously outside the United States, as far as you know, at Monte Carlo or Geneva?

A. So far as I know.

Q. Where did she reside at the time she left the United States?

A. At 190 Madison Avenue.

Q. Did she keep that house open after she left and up to the time of her death?

A. No, it was rented prior to her death, and was occupied at one time by Mr. August Belmont.

Q. Was it rented immediately upon her leaving the United States?

A. That I can't say.

Q. Was it rented furnished or unfurnished?

A. Whether there was any furniture in it when Mr. Belmont had it or not I am not certain, but I know that all the furniture was removed.

Q. Do you know whether or not she took it abroad with her?

A. I think so, except such as she disposed of in this country.

Q. So that she had no home during all these years that she was abroad prior to her death ready for occupancy, or anything of that nature, to which she could have returned if she so desired?

A. No.

79 Q. Did she express to you any intention when she went away as to returning, or otherwise, as far as you recollect?

A. No, I am quite certain before she went away she never expressed any intention to me.

Q. In the correspondence you have had with her since she has been abroad, was there any expression in her letters regarding her returning, or otherwise?

A. I don't think there was; the letters were largely business letters.

Q. Do you understand from her will, which was made about three years before her death, and which has been offered in evidence here, that she regarded herself at that time as a resident of Dutchess County, New York?

Mr. BEERS: That is a conclusion of law.

A. I haven't any opinion on that subject which is worth entering on the minutes.

Q. As I understand you, Mrs. Delano owned no bonds on deposit in New York State at the time of her death?

A. No, except the two bonds I have referred to, secured by mortgage.

Q. Did she have any furniture whatever in the United States?

A. Not to the best of my knowledge.

Q. Did she, prior to her death, as far as you know, make any

transfer of property by deed, gift, grant, bargain or sale, in contemplation of her death, or to take effect at or after her death, the property referred to being property in New York State?

A. Not to the best of my knowledge.

Q. As far as you are aware, you have testified to all the property, both real and personal, which Mrs. Delano individually owned at the time of her death which was situate in the State of New York?

A. I have.

Q. It appears from Mrs. Delano's will that she intended by it to exercise certain powers of appointment. Please state how the powers of appointment exercised by her will were created, and produce, if you have them, the instruments by which such powers of ap-
80 pointment were created, and state who are now the trustees under the instruments by which these powers were created, and what property, real and personal, was appointed by the will of Mrs. Delano under each power.

Mr. BEERS: All of the parties whose appearance has been noted object to this question on the following grounds:

That Article X of Chapter 908 of the Laws of 1896, and the amendments thereto, entitled "Taxable Transfers," do not confer upon the Surrogates' Court of the County of New York jurisdiction over the property appointed by the will of Mrs. Laura Astor Delano for the purpose of assessing the same for a transfer tax.

Second. That Chapter 284 of the Laws of 1897, is unconstitutional and void under Section 24, Article III, of the Constitution of the State of New York, in that it does not distinctly state the tax and object to which it is to be applied.

Third. That Article X of Chapter 908 of the Laws of 1896, and the amendments thereto, as applied to the rights and interests of the appointees under the will of Laura Astor Delano, is unconstitutional and void under Section VI of Article 1 of the Constitution of the State of New York, which provides that no person shall be deprived of property without due process of law, and private property shall not be taken for public uses without just compensation.

Fourth. That Article X of Chapter 908 of the Laws of 1896, and the amendments thereto, as applied to the rights and interests of the appointees under the will of Laura Astor Delano, is unconstitutional and void, and that it is repugnant to Section 10 of Article I of the Constitution of the United States, in that it impairs the obligations of contracts.

Fifth. That Article X of Chapter 908 of the Laws of 1896,
81 and the amendments thereto, as applied to the rights and interests of the appointees under the will of Laura Astor Delano, is unconstitutional and void, being repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it seeks to deprive citizens of property without due process of law and to deny persons affected thereby equal protection of the laws.

By Mr. JUDD:

All these objections, both constitutional and otherwise, have been overturned by the decision of the Court of Appeals in Matter of Laura

Astor Delano handed down November 24th, 1903, which held that the transfer of the property passing by virtue of the exercise by Laura Astor Delano in favor of Arthur Astor Carey of the powers of appointment created by the two deeds of 1848 and 1849, is taxable under the provisions of sub-division five of Section 220 as added to the Tax Law of 1896 by Chapter 284 of the Laws of 1897. This decision was made by the Court of Appeals in a proceeding taken as follows: Ater you had been appointed Appraiser and before you had made your report, and on the 9th day of December, 1902, an order was issued out of the Surrogates' Court of New York County upon an affidavit of George C. Kobbe, one of the attorneys for Arthur Astor Carey, to show cause before said Court why said proceedings should not be dismissed as to Arthur Astor Carey and as to the property mentioned in said two deeds. From the order entered in the Surrogates' Court of New York County on the 2nd day of February, 1903, denying the motion to dismiss said procedings, an appeal was taken by Arthur Astor Carey to the Appellate Division, where said order was reversed. Subsequently, an appeal was taken by the Comptroller to the Court of Appeals, whose decision has been
82 handed down as before mentioned.

The State Comptroller further contends that as far as the transfer of the property passing to Arthur Astor Carey by virtue of the exercise by Laura Astor Delano of the powers of appointment contained in said deeds made in 1848 and 1849 is concerned, and for the purposes of the present proceeding for the appraisal by you of such transfer of property to Arthur Astor Carey, all questions, exceptions or objections whether constitutional, jurisdictional or otherwise, have been determined in such proceeding taken as aforesaid by Arthur Astor Carey, and such proceeding is *res adjudicata* thereto. If Arthur Astor Carey desires to raise any federal questions, it can only be done by an appeal to the United States Supreme Court from the order entered upon the decision of the Court of Appeals in the proceeding above mentioned.

Mr. MAZET: Objection overruled.

Exception.

A. First, by the tenth clause of the will of the first John Jacob Astor, he devised said real property to his son, William B. Astor, for life, with power of appointment. By the fifth clause of the will of William B. Astor, the latter appointed a portion of the property devised to him as aforesaid by the will of his father to his daughter, Laura Astor Delano, for life, giving her a further power of appointment. For the purpose of defining the property so appointed by the fifth clause of the will of William B. Astor, the executors of William B. Astor made a deed to Laura Astor Delano, recorded in New York County, Liber 1369 of Conveyances, page 218. The property affected by these powers of appointment contained in the tenth clause of the will of John Jacob Astor and the fifth clause of the will of William B. Astor consists of real estate in New York City known as
83 308 and 310 West Fifteenth Street, and 55 to 61, inclusive, West Seventeenth Street, and 268 to 276, inclusive, Sixth Avenue. I produce a copy of the tenth clause of the will of John

Jacob Astor, and of the second and fifth clauses of the will of William B. Astor.

Said clauses follow:

Will of John Jacob Astor, Tenth Clause.

Tenth: All the rest, residue and remainder of my real and personal estate, I give and devise to my son, William B. Astor; to have and to hold the said real estate to him for his life. And I authorize him to appoint the same after his death, to and amongst his children and their issue, in such shares and for such estates, and on such conditions as he may think fit, by deed or by will; and in case he shall leave no such valid appointment, I devise the same to his children, and their heirs and assigns, forever, including as well those now born as subsequently born children. And I hereby charge upon the said residuary estate thus devised portions of Two hundred thousand dollars, to be settled upon each of his daughters, and her issue, in such manner as he may think fit, subject to the condition of their marrying with the consent of himself or his wife, or such persons as he may nominate in his will; which portions are to be set apart out of the real estate devised to him as above and which, when set apart, are not to form any encumbrance upon the residue. And in case of his leaving no appointment as aforesaid, these portions are to be considered as part of his daughters' shares on the division of the estate now devised among his children. And as to the personal estate bequeathed to him, it is my will that he employ the same in the improvement of the real estate to him hereinabove devised, in such manner as he may think fit.

84 My service of plate, above mentioned, I give to be used by my son, William B. Astor, for life; and after his death, to such of his sons as he may appoint.

Will of William B. Astor, Second Clause.

Second: Whereas, under the tenth clause of article of the will of my father, John Jacob Astor, deceased, bearing date the fourth day of July, eighteen hundred thirty-six, he hath authorized me to appoint the residuary real estate given to me for life, to and amongst my children and their issue, in such shares, for such estates, and on such conditions as I might think fit, by deed or will. And whereas, under the tenth clause of the codicil dated the nineteenth day of January, in the year of our Lord one thousand eight hundred and thirty-eight, annexed to the said will, my father gave to me absolutely one-half of his residuary personal estate and the income of the other half until I should think fit to extend it in the improvement of his residuary real estate, and the balance thereof, unexpended at my death, he gave to my children, or to such of them, and in such manner and proportions as I might appoint by will. And whereas, by another codicil, dated the twenty-second day of December, in the year eighteen hundred and forty-three, my said father left it discretionary with me to appoint certain portions to my daughters,

which were by the said tenth clause of his will charged on the residuary estate given to me for life, and declared that unless I chose to appoint such portions, they should not be charged on such estate; as by reference to the said will and codicils will fully appear. Now, I hereby declare, that in the following clauses of this my will, I intend to execute the said powers of appointment given to me as aforesaid by my father. And I do further declare that all the
85 devises and gifts hereinafter made of my own estate to my children and their issue, or to any of them, are upon the direct understanding and condition that they shall respectively acquiesce in this execution of the said powers; and also, inasmuch as the administration of my father's estate has embraced a large amount of property and a great number of transactions, and I intend that all which has been done in such administration shall be acquiesced in and confirmed by my children and their issue; and I do further declare all such devises, legacies and gifts to be upon the further direct understanding and condition that my children and issue shall respectively acquiesce in such administration up to and until my decease; and in case of any violation of these conditions in whole or in part by any of my children or issue, the devises or gifts to the persons so violating shall be void, and the property disposed of by such devises and gifts shall go to my children and issue not violating the same, as an increase and augmentation of the devises and gifts to them ratably, according to the amounts thereof.

And I further appoint, choose and declare my will to be, that the portions for my daughters, or either of them, shall not be charged on the residuary estate of my father; and in lieu thereof, I have appointed and given to them what is hereinafter expressed.

William B. Astor, Fifth Clause.

Fifth: Inasmuch as on the marriage of my daughter Laura with Franklin H. Delano, Esquire, a settlement of property to the amount of two hundred thousand dollars to her use was made (bearing date in September of the year eighteen hundred and forty-four) with benefits to the expected issue of her said marriage, by my father
86 and myself; one hundred thousand dollars of which was part of the New York City stock aforesaid, and fifty thousand dollars of which came from my father directly; I do, therefore, in exercise of the said power of appointment under my father's will, give and appoint to her out of the residuary estate of my father so much property as in value shall amount to two hundred thousand dollars in addition to what is above mentioned, the same to be selected to the extent of one-third as nearly as may be from unimproved real estate, and the residue from improved real estate, and to be valued and set apart by appropriate deeds as is hereinbefore directed in respect of the similar provision for my daughter Alida; to have and to hold the said lands and real estate to the said Laura for her life, without impeaching of waste, to her separate use, exclusive of the rights of her husband, present or future, in or to the same.

And whereas, in the above mentioned settlement for my daughter

Laura was included certain land called the Cozine Farm of my own individual property which I require to be valued at fifty thousand dollars; *and whereas,* I have also advanced for the purchase of a house on Lafayette Place and the furnishing thereof thirty thousand dollars; and I furthermore advance in September of the year eighteen hundred and forty-nine, ten thousand dollars toward completing a house at Red Hook, in Dutchess County, built by Mr. Delano, and also the further sum of fifty thousand dollars, Ohio State debt (to James Gallatin and John J. Astor, my son, in trust for her), which advancements out of my own estate amount to one hundred and forty-thousand dollars. Now I do further give, devise and bequeath the further sum of two hundred and ten thousand dollars from my individual property to my executors during the life of my
87 daughter Laura, in trust, to keep the same invested and to receive the income thereof, and after defraying taxes and all charges upon or in respect of the same, to apply the net income to the use of my daughter, free from all disposition, debts, control or management of her present or any future husband. On her death, if she, Laura, shall leave issue surviving her, I appoint, devise and give as well the said real estate from my father as the capital sum last mentioned to her issue surviving her *per stirpes;* but if she shall leave no issue surviving her, I give the same to her brothers, John and William and her sister Alida; or if any of them be deceased, without issue surviving Laura, to the survivors or survivor of them. If any of them be deceased, leaving issue surviving her, then the issue shall take what their parent if surviving her would have taken. But if any person, taking as issue under this article of my will any part of my own or of my father's residuary estate, shall die under the age of twenty-one years, without issue surviving him or her, the share or part it would have taken I give to its brothers and sister; but if there be no brother or sister, or he, she or they or any of them should die under the age of twenty-one years, without surviving issue, then I give its share to the said John, William and Alida, and the survivors or survivor of them, and the issue of any of them deceased, in like manner as in this clause above expressed. And I give to Laura power to give the property, the income of which for her life appertains to her, or is to be applied to her use by this will, to and among her issue, brothers, sister, Margaret A. Ward, or to any of them, or to their issue or any of them, in such sums, proportions and shares, and for such estates and on such conditions and limitations as she may think fit, by instrument in nature of a will, and also to secure to her husband an annual income of not exceeding five
88 thousand dollars per annum.

This property is disposed of by the first clause of the will of Laura A. Delano.

By the second clause of the will of William B. Astor, he devised to his daughter Laura Astor Delano the property 190 Madison Avenue, together with the stable attached giving her power of appointment. The property so devised and subject to such power is the lot and building 190 Madison Avenue, and the lot and stable 15 East

Thirty-fourth Street. This passes under the first paragraph of Mrs. Delano's will.

I produce a copy of the second clause of the fifth codicil of the will of William B. Astor.

Said clause is as follows:

William B. Astor, Fifth Codicil, Second Clause.

Second. I give and devise to my daughter, Laura, wife of Franklin H. Delano, Esquire, a piece of land on the westerly side of Madison Avenue, next north of the lot, in this codicil given to my daughter Alida, commencing thirty-seven feet and three-eighths of an inch northerly from the corner of Thirty-fourth Street running in front along Madison Avenue thirty-seven feet and three-eighths of an inch, and of that width, ninety-five feet westerly; also a lot of land on the northerly side of Thirty-fourth Street, next west of a lot in this codicil given to my daughter Alida, running twenty-five westerly along the northerly side of Thirty-fourth Street and of that width, seventy-four feet and three-fourths of an inch in depth; and also a piece or strip of land, four feet and three-eighths of an inch in width, lying northerly in the rear of the lot in this codicil given to my
89 daughter Alida, and extending so as to connect the lot on Madison Avenue and the lot on Thirty-fourth Street herein given to my daughter Laura; to have and to hold the said lots and pieces of land to my said daughter Laura for and during her natural life and as her separate estate, without impeachment of or for any manner of waste; and with all and singular, the powers, privileges, advantages, benefits and conditions expressed in the seventh and twelfth articles of my will, and as if the devise of this present land had been orignally contained in the fifth article of my said will; and, subject to this devise for life to my said daughter Laura, I give and devise the future estate in this land in the same manner and to the same persons and on the same conditions, and with the same powers, as in my said will are applied to the lands given to my said daughter Laura, in and by the said fifth article or by the force and effect thereof.

The lands particularly devised by this codicil are comprised in five lots on a map of my estate, designated by numbers eighty-eight, eighty-nine, ninety, ninety-one and ninety-two.

By the fifth clause of the will of William B. Astor, the testator gave the sum of $210,000 from his individual property to his executors during the life of his daughter, Laura Astor Delano. The present trustees of this trust are the New York Life Insurance & Trust Company, Mr. Edmund L. Baylies and myself. The trust was for the benefit of Mrs. Delano during her life, and she had the power of appointment with respect to the principal; and in this case, as well as in each of the other cases above mentioned, the power of appointment was limited to certain class of persons, and there was a remainder in default of appointment. The property included in this trust at the time of Mrs. Delano's death is as follows:

90 382 Broadway and 331 West 14th Street; also personal property as follows:

$15,000, New York City, 3½%, consolidated gold stock, due October 1st, 1915, coupon.

$49,700, New York City, 3½% gold, corporate, registered stock, due October 1st, 1918.

Bond and mortgage of Redmond Forrestal	$6,000.00
Bond and mortgage of John L. Logan	12,000.00
Bond and mortgage of Mary L. Cormack	12,000.00
Bond and mortgage of Mary L. Cormack	22,000.00
Bond and mortgage of Jules Vatable	12,000.00
Bond and mortgage of Jules Vatable	3,000.00
Bond and mortgage of William H. Post	12,000.00
Cash uninvested	13,670.76

I produce a copy of a deed made by William B. Astor to Laura A. Delano, dated September 30, 1848.

The deed was offered in evidence by Mr. Judd, on behalf of the State Comptroller; received and marked Exhibit A of this date.

The real property described in this deed is now known as 45 Lafayette Place.

I produce a deed dated September 6th, 1849, made by William B. Astor to James Gallatin and John Jacob Astor, Jr., as trustees.

The deed was offered in evidence by Mr. Judd; received and marked Exhibit B of this date.

Mr. Lucius H. Beers and I were trustees under this deed of trust at the time of Mrs. Delano's death. The property then held by the trustees was as follows:

Bond of Jacob Lissner secured by mortgage on premises 722 Columbus Avenue	$15,000.00
Bond of Sarah J. O'Neill, secured by mortgage on premises 67 Irving Place	15,000.00
91 Bond of Harris D. Colt, secured by mortgage on premises on East 61st Street	20,000.00

I produce deed made by John Jacob Astor and William B. Astor and wife to Laura Astor and to James Gallatin and John Jacob Astor, the younger, as trustees, dated September 10, 1844.

The deed was offered in evidence by Mr. Judd; received and marked Exhibit C of this date.

The trustees under this deed at the time of Mrs. Delano's death were Lucius H. Beers and I. The personal property held by the trustees at that time was as follows:

Bond of M. S. Bartlett secured by mortgage on premises 497 Third Avenue	$12,000.00
Bond of Richard Irvin secured by mortgage on premises 12 West 36th Street	40,000.00
Bond of P. A. Gribet	12,500.00
Bond of Herman Queller	20,000.00

Bond of Annie N. Harris	14,500.00
Bond of Joseph A. Keogh	3,000.00
Bond of Cornelia K. Averill	40,000.00
Uninvested cash	1,169.46

The following real estate was also included in this deed of trust:

Cozine Farm.

Block 1045.

911 Eighth Avenue, 303 West 54th Street, 913 Eighth Avenue,	Subject to lease		$55,000.00
915 Eighth Avenue, 919 do. 305 West 54th Street,	Subject to lease		60,000.00
921 Eighth Avenue, 923 do.	Subject to lease		45,000.00
925 do. 927 do. 302 West 55th Street,	Subject to lease		60,000.00
92			
307 West 54th Street,	Subject to lease		8,000.00
304 West 55th Street,	do.		8,000.00
306 do.	do.		8,000.00
308 do.	do.		8,000.00
310 do.	do.		8,000.00
312 do.	do.		8,000.00
314 do.	do.		8,000.00
316 do.	do.		8,000.00
318 do.	do.		8,000.00
320 do.	do.		8,000.00
322 do.	do.		8,000.00
324 do.	do.		8,000.00
326 do.	do.		8,000.00
328 do.	do.		8,000.00
330 do.	do.		9,500.00
332 do.	do.		9,500.00
334 do.	do.		9,500.00
336 do.	do.		9,500.00
338 do.	do.		9,500.00
340 do.	do.		9,500.00
342 do.	do.		9,500.00
344 do.	do.		9,500.00
346 do.	do.		9,500.00
348 do.	do.		9,500.00
350 do.	do.		9,500.00
352 do.	do.		9,500.00
354 do.	do.		9,500.00
356 do.	do.		9,500.00

358	do.	do.	.....	9,500.00
360	do.	do.	.....	9,500.00
362	do.	do.	.....	9,500.00
364	do.	do.	.....	9,500.00
366	do.	do.	.....	9,500.00
368	do.	do.	.....	6,500.00
370	do.	do.	.....	6,500.00
372	do.	do.	.....	6,500.00
321	West 54th Street,			
323	do.			
325	do.			
327	do.	12 Vacant lots	.....	120,000.00
327 adj.	do.			
339–351	do.			
830	Ninth Avenue, Subject to lease		.....	12,000.00
832	do.	do.	.....	12,000.00
834	do.	do.	.....	5,000.00
836	do.	do.	.....	5,000.00
838	do.	do.	.....	5,000.00
840	do.	do.	.....	7,000.00

93 Block 1046.

329	West 56th Street, Subject to lease		.....	8,000.00
331	do.	do.	.....	8,000.00
333	do.	do.	.....	8,000.00
347	do.	do.	.....	9,500.00
349	do.	do.	.....	9,500.00
351	do.	do.	.....	9,500.00
353	do.	do.	.....	9,500.00
355	do.	do.	.....	9,500.00
357	do.	do.	.....	9,500.00
359	do.	do.	.....	9,500.00
361	do.	do.	.....	9,500.00
363	do.	do.	.....	9,500.00
365	do.	do.	.....	9,500.00
842, 844, 846, 848, 850	Ninth Avenue plot,	do.	.....	50,000.00
375, 371, 373	West 55th Street,			

Block 1064.

831	Ninth Avenue, Subject to lease		.....	7,500.00
833	do.	do.	.....	7,500.00
835	do.	do.	.....	7,500.00
837	do.	do.	.....	7,500.00
839	do.	do.	.....	9,500.00

402	West 55th Street,	do.	.....	7,500.00
404	do.	do.	.....	8,500.00
406	do.	do.	.....	8,500.00
408	do.	do.	.....	4,500.00
410	do.	do.	.....	4,500.00
412	do.	do.	.....	6,000.00
414	do.	do.	.....	6,000.00
416	do.	do.	.....	5,500.00
418	do.	do.	.....	5,400.00
420	do.	do.	.....	5,200.00
430–442	do.	plot 6½ lots, vacant	.....	45,500.00
452	West 55th Street.	Subject to lease	.....	7,000.00
454	do.	do.	.....	7,000.00
456	do.	do.	.....	7,000.00
828	Tenth Avenue, with old building,	subject to lease	..	7,000.00

94 Block 1065.

841	Ninth Avenue,	Subject to lease	.....	9,000.00
843	do.	do.	.....	7,000.00
845	do.	do.	.....	7,000.00
849 851	do.	do.	.....	25,000.00
403	West 55th Street,	Subject to lease	.....	4,000.00
405	do.	do.	.....	3,800.00
407	do.	do.	.....	6,000.00
409	do.	vacant lot	.....	6,000.00
411	do.	Subject to lease	.....	10,500.00
413	do.	do.	.....	7,650.00
415	do.	do.	.....	7,650.00
417	do.	do.	.....	7,500.00
419	do.	do.	.....	7,500.00
421	do.	do.	.....	7,000.00
421A	do.	do.	.....	500.00
423	do.	do.	.....	7,000.00
423A	do.	do.	.....	525.00
425	do.	do.	.....	7,000.00
425A	do.	do.	.....	550.00
427	do.	do.	.....	7,000.00
427A	do.	do.	.....	575.00
429	do.	do.	.....	7,000.00
431	do.	do.	.....	7,000.00
433	do.	do.	.....	7,000.00
435	do.	do.	.....	7,000.00
437	do.	do.	.....	7,000.00
439	do.	do.	.....	7,000.00
441	do.	do.	.....	7,000.00
443	do.	do.	.....	7,000.00
445	do.	do.	.....	7,000.00
447	do.	do.	.....	7,000.00
449	do.	do.	.....	7,000.00
451	do.	do.	.....	7,000.00
453	do.	do.	.....	7,000.00

834–840 Tenth Avenue, with old buildings		45,000.00
842–848 Plot Tenth Avenue, old buildings		30,000.00
434 West 56th Street, old buildings		7,000.00
436 West 56th Street, vacant lot		7,000.00
438 do.	do.	7,000.00
440 do.	with old building	7,000.00
446 do.	vacant lot	5,000.00
450 do.	do.	7,000.00
95	Block 1084.	
831 Tenth Avenue,	Subject to lease	12,000.00
833 do.	do.	8,500.00
835 do.	do.	8,500.00
837 do.	do.	8,500.00
839 do.	do.	8,500.00
841 do.	do.	8,500.00
843 do.	do.	8,500.00
845 do.	do.	8,500.00
847 do.	do.	8,500.00
849 do.	do.	12,000.00
503 West 55th Street,	do.	5,000.00
505–507 do.	do.	12,000.00
509 do.	do.	6,000.00
511 do.	do.	6,000.00
513 do.	do.	6,000.00
515 do.	with old building	5,000.00
517 do.	do.	5,000.00
519 West 55th Street,	Subject to lease	5,000.00
521 do. 523 do. 525 do.	3 vacant lots	15,000.00
527 do. 529 do. 531 do.	Subject to lease	15,000.00
533 do. 535 do.	do.	9,000.00
537 do. 539 do.	do.	9,000.00
541 do.	Vacant	4,500.00
543 do.	do.	4,500.00
792 794 796 798	Eleventh Avenue plot, about 3½ vacant lots	22,000.00
800 Eleventh Avenue,	Subject to lease	6,250.00
802–804 do.	do.	14,000.00
545 West 55th Street, 547 do. 549 do. 551 do. 546 West 56th Street, 548 do. 550 do.	do.	35,000.00

544	do.	vacant	4,500.00
542	do.	do.	4,500.00
540	do.	do.	4,500.00
538	do.	Subject to lease	4,500.00
96			
536	West 56th Street,	Subject to lease	4,500.00
534	do.	do.	4,500.00
532	West 56th Street,	vacant	4,500.00
530	do.	do.	4,500.00
528	do.	Subject to lease	5,000.00
526	do.	vacant	5,000.00
524	do.	do.	5,000.00
522	do.	do.	5,000.00
520	do.	do.	5,000.00
518	do.	do.	5,000.00
516	do.	do.	5,000.00
514	do.	do.	5,000.00
512	do.	Subject to lease	6,000.00
510	do.	do.	6,000.00
508	do.	vacant	6,000.00
506	do.	do.	6,000.00
504	do.	Subject to lease	6,500.00
502	do.	do.	5,000.00

Block 1805.

806	Eleventh Avenue, with gore, subject to lease	$9,000.00

Block 1103.

793	Eleventh Avenue, with gore,	vacant	10,000.00
795	do.	Subject to lease	6,000.00

Mr. William B. Astor, after the execution and delivery of the deed of September 10th, 1844, acquired certain parcels of real property of irregular shape adjoining the Cozine Farm. By the fourth clause of the third codicil to his will he devised these parcels. I produce a copy of the fourth clause of the third codicil of the will of William B. Astor:

William B. Astor, Third Codicil, Fourth Clause.

Fourth. Having acquired certain gores or pieces of land adjoining to the lands forming part of the Cozine Farm, and adjoining the lands embraced in the settlement deed for my daughter Laura Delano, now, I devise and give all such gores and pieces of
97 land to be held by the same persons, and on the same limitations, and with the same powers, and on the same trusts and conditions as are or shall be applicable to the said adjoining lands, and the same are hereby given and devised as part thereof.

The gores referred to in this schedule are as follows: A piece of land on the northerly side of Fifty-fourth Street commencing 350 feet east of Ninth Avenue, having a frontage of 125 feet on Fifty-fourth Street, and a depth of 34 feet 4¾ inches on the westerly side and 18 feet 9⅞ inches on the easterly side. Also another piece on the southwesterly corner of Tenth Avenue and Fifty-sixth Street, having a frontage of 3 feet 6½ inches on Tenth Avenue and 29 feet 5½ inches on Fifty-sixth Street.

I produce a deed made by William B. Astor to John Jacob Astor, Jr., William Astor and George De Forrest Lord and Laura A. Delano, dated October 28, 1865.

Said deed was offered in evidence by Mr. Judd; received and marked Exhibit D of this date.

Mr. Beers and I have been substituted as trustees under this deed, and were such trustees at the time of Mrs. Delano's death. The property held by the trustees at the time of Mrs. Delano's death is as follows:

Bond and mortgage of Joel Hyams	$55,000.00
Bond and mortgage of Jonas Weil	30,000.00
Bond and mortgage of Joseph A. Kehoe	11,000.00
Bond and mortgage of J. A. Townsend, Jr.	17,000.00
Bond and mortgage of Henry W. Schmidt	17,000.00
Bond and mortgage of Frederick Meyer	18,000.00
Bond and mortgage of Dometille Denison	10,000.00
Uninvested cash	27,746.24

98 and the real estate 57 East One Hundred and Twentieth Street, bought in by the trustees under foreclosure.

I produce a copy of the paper referred to by Mrs. Delano in her will as the special will and codicils referred to in the seventh article of the ninth codicil to "the will of my said father."

Said special will was offered in evidence by Mr. Judd; received and marked Exhibit E of this date.

Robert E. Gillespie-Stainton, Mr. Beers and I are, and at the time of Mrs. Delano's death were, the trustees under this special will. The property held by the trustees consists of about twenty-six thousand pounds sterling in British Consols in the physical possession of Mr. Gillespie-Stainton, of London, England.

By Mr. JUDD:

Q. They were in his possession in London at the time of the death of Mrs. Delano?

A. Yes.

Mr. BEERS: I move to strike out so much of Mr. Lord's answer to the preceding question as relates to appointments made under powers created by the deeds of September 10th, 1844, of 1848, of 1849 and of 1865, on the grounds that the interest and title of the appointees under Mr. Delano's will was acquired by them under deeds made respectively in the years 1844, 1849, 1848 and 1865.

Mr. JUDD: I simply state that this is covered by the decision above mentioned.

Mr. MAZET: As I understand the decision of the Court in the matter of Delano, the power to tax does not relate to the original instrument or the character of the instrument, but to the power of appointment exercised by her will, this being a tax not on the
99 property itself, but on the right of succession as created by the exercise of such power under the will of this decedent. Under that decision I shall have to overrule your objection.

Exception.

By Mr. BEERS:

Q. Had the securities held under the provisions of the special English will of Mr. William B. Astor ever been in the United States?

A. They had not since the appointment of Mr. Beers and myself on the 20th day of December, 1901, to my own knowledge. Before that time, I think, the trustees were all residents of Great Britain.

By Mr. JUDD:

Q. Do you know whether or not any of the property under that special will of William B. Astor was ever in the United States—was it immediately put into these British Consols?

A. It was in British Consols. The special will contained specific legacies of British Consols belonging to Mr. William B. Astor at the time of his death.

Q. And you understand these are the same British Consols?

A. Those are the same British Consols which were held by the trustees at the date of Mrs. Delano's death.

The accrued interest on the mortgages held by the trustees under the deed of September 10, 1844, at the time of Mrs. Delano's death amounted to $2,720.20. The accrued interest on the securities held under the deed of 1849 to June 15, 1902, amounted to $884.12. The accrued interest on the securities held under the deed of 1865 to June 15, 1902, amounted to $2,153.73.

Q. I notice by the codicil to the will, made April 8, 1901, that two persons whose residence is given as New York City were witnesses. Do you know whether or not that codicil was executed in New York?

A. It was executed abroad, but I suggested to Mrs. Delano
100 to have the codicil witnessed by New Yorkers so that it might be more easily proven.

Q. As I understand it, the will and codicil were proved as a foreign will, were they not, in the Surrogates' office in this county?

A. Yes, jurisdiction depending upon there being assets here.

The Comptroller produces and offers in evidence an affidavit of Alfred E. Marling, showing the valuations of the real property over which Laura Astor Delano exercised the powers of appointment created by the trust deeds of 1844, the deed of 1848 and the deed of 1865.

Said affidavit was received and marked Exhibit F of this date.

Mr. BEERS: All of the parties appearing object on the same grounds as the objection made to the testimony of Mr. Franklin B. Lord; and on the further ground that the interest and title of the appointees under the will of Laura Astor Delano was acquired under deeds made in 1844, 1848 and 1865.

Objection overruled; exception.

WINTHROP ASTOR CHANLER, is called by Mr. Beers to testify as to the family history of Laura Astor Delano and of other descendants of William B. Astor.

Mr. JUDD: I object to the introduction of any testimony under this head, except for the purpose of showing the relationship that exists between the donee of the power and the beneficiaries under the power.

Objection overruled.

Hearing adjourned to December 3, 1903, at 4 o'clock P. M.

101 Hearing continued December 3rd, 1903, 4 P. M.

Appearances: Same as before.

WINTHROP ASTOR CHANLER, called as a witness, being sworn, testified as follows:

Examined by Mr. BEERS:

Q. You are a son of Mrs. Margaret Astor Chanler, and great grandson of Mr. William B. Astor, are you not?

A. Yes, sir.

Q. Are you familiar with the family history of Mr. William B. Astor and his direct descendants?

A. I am.

Q. Please state the names of all of the children whom Mr. William B. Astor had.

Mr. JUDD: I object to the question as immaterial, irrelevant and incompetent, except in so far as it tends to show the relationship that existed between the donee of the power under William B. Astor's will and the deeds of trust and the beneficiaries under those powers. As I understand it, under the decision of the Appellate Division in the matter of Seaver and the Court of Appeals in the matter of Dows, that is the only relationship on which the tax is based.

Mr. MAZET: I will allow the testimony for what it is worth.

Exception.

A. John Jacob, Emily, William, Alida, Laura and Henry; the latter is still living.

Q. That is, Mr. Henry Astor is now living?

A. Yes.

Q. Miss Laura Astor was afterwards Mrs. Delano, whose will has been introduced in this proceeding?

A. Yes.

Q. Is Mr. William Astor, the son of Mr. William B. Astor, living?
A. No.
102 Q. When did he die?
A. April 25, 1892.
Q. Please state the names of all of the children of Mr. William Astor—that is, the son of Mr. William B. Astor?
A. Emily, Augusta, Helen, Caroline and John Jacob.
Q. By Augusta you refer, do you not, to Charlotte Augusta Astor, who is now Mrs. Charlotte Augusta Haig?
A. I do.
Q. Miss Emily Astor was afterwards Mrs. Van Allen, was she not?
A. Yes.
Q. Miss Helen Astor was afterwards Mrs. Roosevelt?
A. Yes.
Q. Mrs. Caroline Astor is now Mrs. Wilson?
A. Yes.
Q. Have any of the children of Mr. William Astor, the son of Mr. William B. Astor, died?
A. Yes; Mrs. Van Allen and Mrs. Roosevelt.
Q. When did Mrs. Emily Van Allen die?
A. She died fully 25 years ago.
Q. That is, she died before Mrs. Delano?
A. Yes, many years before.
Q. Please state the names of all the children whom Mrs. Emily Van Allen had?
A. James Laurens, Sarah Stewart and Mary.
Q. And Sarah Stewart Van Allen is now Mrs. Collier, is she not?
A. Yes.
Q. Are all three of these children of Mrs. Van Allen now living?
A. Yes.
Q. And these are the only children Mrs. Van Allen ever had?
A. All to my knowledge, yes, sir.
Q. When did Mrs. Helen Astor Roosevelt die?
A. I couldn't give you the date.
Q. Did she die before June 15, 1902?
A. Yes.
Q. Please state the names of all the children whom Mrs. Helen Astor Roosevelt had?
A. James Roosevelt, Jr., and Helen Rebecca.
Q. Are both of these children now living?
A. Yes.
Q. Is Mr. John Jacob Astor, who was the son of Mr. William B. Astor, now living?
A. No.
Q. When did he die?
A. He died February 22d, 1890.
103 Q. Did he leave any children?
A. One, Mr. William Waldorf Astor.
Q. Is Mr. William Waldorf Astor the only child Mr. John Jacob Astor ever had?
A. Yes, so far as I know.

Q. In speaking of a daughter of Mr. William B. Astor, named Alida, you referred, did you not, to Miss Mary Alida Astor, who was afterward Mrs. Carey?

A. Yes.

Q. Is she now living?

A. No.

Q. When did she die?

A. 1882 or 1883; I am not sure of the exact date—I went to her funeral but I don't remember the date.

Q. Did she leave any children?

A. She did.

Q. Please state their names?

A. Margaret Laura, Arthur Astor and Henry Reginald Astor.

Q. Did Mrs. Mary Alida Carey leave any children or descendants of deceased children other than the three whom you have named?

A. No.

Q. Is Mr. Henry Reginald Astor Carey living?

A. No.

Q. When did he die?

A. In May, 1893.

Q. Was he ever married?

A. Not that I know of.

Q. Miss Margaret Laura Carey was afterward Mrs. Margaret Laura de Stuers, was she not?

A. Yes.

Q. And is now Mrs. Zborowski?

A. Is now Mrs. Zborowski, a widow.

Q. Mr. Arthur Astor Carey and Mrs. Zborowski are now living, are they not?

A. Yes.

Q. Can you state the names of the children of Mrs. Zborowski who were children of her marriage with Mr. de Stuers?

A. John Hubert, Margaret and Hubert.

Q. Miss Emily Astor, the daughter of Mr. William B. Astor, to whom you have referred, was afterward Mrs. Ward, was she not?

A. Yes.

Q. She was afterward your grandmother?

A. She was.

Q. Did she leave any children?

A. She left one—my mother.

104 Q. Did she leave any other children or descendants of deceased children?

A. No.

Q. Your mother was afterward Mrs. John Winthrop Chanler?

A. She was.

Q. Please state the names of all the children of your mother, both those who are now living and those who have died, and in stating the name, please give the date of birth of each.

A. John Armstrong, born October 10, 1862; Winthrop Astor, born October 14, 1863; Emily, born in 1864 and died in 1871; Elizabeth Winthrop, now Mrs. John J. Chapman, born February 23rd, 1866; William Astor, born June 11, 1867; Marion Ward, born

in 1868 and died February 11, 1883; Lewis Stuyvesant, born September 24, 1869; Margaret Livingston, born October 31, 1870; Robert Winthrop, born February 22, 1872; Alida Beekman, now Mrs. C. Temple Emmet, born June 22, 1873; Egerton White, I don't remember when he was born, but he died November 30, 1882.

Q. Your sister Emily was about 7 years old when she died, was she not?

A. Yes.

Q. Your brothers Egerton and Marion were both minors and unmarried?

A. At the time of their death they were.

Q. What was the date of your mother's death?

A. December 12, 1875.

Q. Has your brother, John Armstrong Chanler, any children?

A. No.

Q. You have children, have you not?

A. Yes.

Q. Please give their names and the dates of their birth.

A. Laura Astor, born September 30, 1887; Beatrice Margaret Mary, born August 21, 1891; Hester, born April 25, 1893; Marion Winthrop, born August 24, 1895; May Margaret Gabrielle, born May 20, 1897; Hubert Winthrop, born September 27, 1900; Theodore Ward, born April 29, 1902.

Q. Has your sister, Mrs. Chapman, any children?

A. One.

Q. Please give his name, and the date of his birth, if
105 you know it.

A. His name is Chanler Armstrong, born April 25, 1901.

Q. Has your brother, William Astor Chanler, any children?

A. No.

Q. Has your brother, Lewis Stuyvesant, any children?

A. Three.

Q. Please give their names and the dates of their birth.

A. Lewis Stuyvesant, Jr., born July 3, 1891; Alida, born January 7, 1894; William Astor, second, born July 10, 1895.

Q. Your sister Margaret is unmarried, is she not?

A. Yes.

Q. Has your brother, Robert Winthrop, any children?

A. One, Dorothy, born November 24, 1898.

Q. Has your sister, Mrs. Emmet, any children?

A. Four; Elizabeth Winthrop, born September 8, 1897; Margaret C., born April 10, 1899; Christopher T., born March 18, 1900; Hester Alida, born December 5, 1902.

Q. Can you give the date of death of your grandmother, Mrs. Emily Astor Ward?

A. No, I cannot.

Q. She died more than thirty years ago, did she not?

A. Yes.

Q. Can you state the date of death of your great grandfather, Mr. William B. Astor?

A. November 24, 1875.

Q. And your grandmother, Mrs. Ward, died before her father, Mr. William B. Astor, did she not?

A. Yes.

Q. Did Mr. William Astor, the son of Mr. William B. Astor, leave any children or descendants of deceased children, other than those whose names you have given?

A. No.

Q. Did Mr. John Jacob Astor, the son of Mr. William B. Astor, leave any children or descendants of deceased children other than his son, Mr. William Waldorf Astor, to whom you have referred?

A. No.

Q. Did Mrs. Mary Alida Carey leave any children or descendants of deceased children other than those you have named in your testimony?

A. No.

106 Q. Did Mrs. Emily Ward leave any children or descendants of deceased children other than those you have named?

A. No.

Q. Did Mrs. Laura Astor Delano leave any children?

A. No.

Q. Mrs. Laura Astor Delano was the sister of your grandmother, Mrs. Emily Ward, was she not?

A. Yes.

Q. And Mrs. Delano was the sister, also, of Mrs. Mary Alida Carey, who was the mother of Mrs. Zborowski, and the grandmother of John Hubert de Stuers, Margaret de Stuers and Hubert de Stuers?

A. Yes.

Q. Mr. Arthur Astor Carey is the son of Mrs. Mary Alida Carey, and is a nephew of Mrs. Laura Astor Delano?

A. Yes.

FRANKLIN B. LORD, having been previously sworn, continued his testimony as follows:

By Mr. BEERS:

Q. In response to questions by Mr. Judd yesterday, you testified that you were trustee under a deed made by Mr. William B. Astor, dated September 10, 1844; also under a deed made by Mr. William B. Astor, dated September 6, 1849; also under a deed made by Mr. William B. Astor, dated October 28, 1865; and you stated that certain personal property was held by the trustees under those deeds. Please state whether, in closing out those trusts, the capital of the trust estate is chargeable with any commissions and expenses, and if so, what the amounts of such commissions and expenses are?

A. The property held under the deed of September, 1844, amounting to $143,169.46, is subject to two trustees' commissions, amounting to $3,243.38, and to the expenses of winding up the trust, which I should estimate as about $5,000.

107 The property held under the deed of September 6, 1849, amounting to $50,000, and is subject to one commission to the two trustees, amounting to $690, and to the expenses of closing the trust, which I estimate at $500.

And the property held under the deed of October 28, 1865, amounting to $199,050, is subject to commissions to two trustees, amounting to $4,361, and to the expenses which I estimate at $5,000.

Q. Please state whether Mrs. Delano, at the time of her death, was possessed of any personal property not in the State of New York, and if so, please state of what that personal property consisted, and, if you know, what its value was at the date of her death.

A.—

She owned bonds secured by mortgage on property in this State, amounting in the aggregate to..... the bonds and mortgages being without the State.	$880,500.00
Bonds of railroad corporations incorporated under the laws of other States, of the par value of $133,000, and of the market value at the time of her death, of....	146,015.00
Harlem River & Portchester, 1st mortgage bonds, of the par value of $25,000, and the market value of..	25,750.00
$10,000, Jersey City, 6% water bonds, 1909, market value	11,200.00
$10,000, Jersey City 5% assessment bonds, September, 1923, market value.....	11,800.00
$8,000, New York City, 3% stock, of the market value of	8,000.00
3065 shares, Morris & Essex Railroad Co., of the market value of.....	301,136.25
She also had on deposit with Messrs. Hottienguer & Company, of Paris, cash and securities, which 108 being taken at their market value as fixed for the purposes of determining the transfer tax payable in France, amounted to..... the exchange being taken at $5.21.	239,827.00
The accrued income on Mrs. Delano's estate, including rents of real estate uncollected, and uncollected interest and dividends on stocks, amounted to.... according to an estimate made by my bookkeeper, which I believe to be correct.	35,049.49

Q. Have you computed the commissions and administration expenses chargeable against Mrs. Delano's entire estate?

A. The total personal estate, according to the foregoing estimates, is $1,835,545.45. The real estate belonging to Mrs. Delano individually is valued by Mr. Marling at $580,000. This would make the aggregate amount upon which commissions are to be computed if the real estate is sold, $2,415,545.45; commissions to three executors on this amount would be $73,036.35. In view of the serious questions arising under Mrs. Delano's will, and the number of parties interested therein, I estimate $75,000 as a reasonable allowance for expenses of administration.

By Mr. JUDD:

Q. As I understand it, none of the bonds and mortgages secured upon New York real estate, none of the railroad bonds of companies

incorporated under the laws of other States or under the laws of this State, which you have just enumerated, were located, at the time of Laura Astor Delano's death, within the State of New York?

A. They were not.

Q. Among the property—securities, etc.—which you have testified was on deposit in Paris at the time of Laura Astor Delano's death, were there any stocks of companies incorporated under the laws of the State of New York?

A. There were not; they were all securities of French or European railroads.

109 Q. Did you draw Mrs. Delano's will?

A. I did not; I drew the codicil.

Q. You didn't draw the first will?

A. No.

By Mr. MAZET:

Q. Did you regard Mrs. Delano as a non-resident of the State of New York?

A. Certainly.

Mr. BEERS: The executors of Mrs. Delano offer in evidence the affidavit of Alfred E. Marling, verified December 3rd, 1903, stating his valuation of the real estate of which Mrs. Delano died seized. Exhibit 3 of this date.

Mr. JUDD: I offer in evidence the affidavit of Alfred E. Marling as to the valuation of all the real estate situate in the State of New York pasing under the will of Laura Astor Delano.

Mr. BEERS: I object to the admission of this affidavit on the following grounds:

That Article X of Chapter 908 of the Laws of 1896, and the amendments thereto, entitled "Taxable Transfers," do not confer upon the Surrogates' Court of the County of New York jurisdiction over the property appointed by the will of Mr. Laura Astor Delano for the purpose of assessing the same for a transfer tax.

Second: That Chapter 284 of the Laws of 1897 is unconstitutional and void under Section 24 of Article III of the Constitution of the State of New York, in that it does not distinctly state the tax and object to which it is to be applied.

Third: That Article I of Chapter 908 of the Laws of 1896, and the amendments thereto, as applied to the rights and interests of the appointees under the will of Laura Astor Delano, is unconstitutional and void under Section VI of Article I of the Constitution of the State of New York, which provides that no person

110 shall be deprived of property without due process of law, and private property shall not be taken for public use without just compensation.

Fourth: That Article X of Chapter 908 of the Laws of 1896, and the amendments thereto as applied to the rights and interests of the appointees under the will of Laura Astor Delano, is unconstitutional and void, and that it is repugnant to Section X of Article 1 of the

Constitution of the United States, in that it impairs the obligations of contracts.

Fifth: That Article X of Chapter 908 of the Laws of 1896, and the amendments thereto, as applied to the rights and interests of the appointees under the will of Laura Astor Delano, is unconstitutional and void, being repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it seeks to deprive citizens of property without due process of law, and to deny persons affected thereby equal protection of the laws.

And on the further grounds, that it appears from the testimony that the appointees of property under the will of Mrs. Laura Astor Delano derived their title from deeds made in 1844, 1848, 1849 and 1865, and on the further ground that in respect to the shares which certain of the appointees would take in default of appointment, they acquired such interest directly under the original deeds of 1844, 1848, 1849 and 1865, and not under any instrument exercising the power of appointment.

Objection overruled; exception.

The affidavit of Mr. Marling was received in evidence and marked Exhibit G of this date.

It is hereby stipulated that wherever a question shall arise herein as to the person or persons in whom title to any property is vested under the terms of the will of Laura Astor Delano, the tax on said property may be assessed in the alternative against all the
111 persons who could take the said property under any determination of such question, and the parties herein waive all objection to the method of assessing said tax by reason of the fact that the same is assessed, in the alternative, against more than one person and not assessed absolutely, but all parties hereto reserve the right to claim herein that the property so appointed is not liable to taxation herein, and that, if liable to taxation, it must be taxed on the basis of the relationship of the appointee to the creator of the power of appointment and not on the basis of the relationship of the appointee to said Laura Astor Delano.

Hearing closed.

Affidavit of Franklin B. Lord Annexed to Testimony.

Surrogates' Court, New York County.

In the Matter of the Transfer Tax upon the Property Transferred and Appointed by the Last Will and Testament of LAURA ASTOR DELANO, Deceased.

COUNTY OF NEW YORK, *ss:*

FRANKLIN B. LORD, being duly sworn, saith:

On page 4 of the minutes it appears that I testified as follows: "She (Mrs. Delano) had $1,655.76 on deposit in the Union
112 Trust Company in this city." I desire to correct this statement. I have ascertained that at the date of her death Mrs.

Delano's account with the Union Trust Company was overdrawn, but that afterward interest on amounts which she had previously had on deposit with that company was credited to her estate by the Trust Company and that such interest, to the date of her death, amounted to $971.39.

I desire to make the same correction in reply to the question asked me by Mr. Mazet, as appears on the fifth page of the minutes, where this amount of $1,655.76 is again referred to.

On pages 18 to 22 of the minutes a list of the various properties making up the Cozine Farm is given. The valuations which appear in that list opposite the various parcels were made by Mr. Alfred E. Marling for the purpose of this proceeding and as appears by his affidavit to that effect offered in evidence on December 3rd.

On page 18 of the minutes twelve vacant lots, Nos. 321 to 327 and 339 to 351 West Fifty-fourth Street, appear as being value at $120,000, and on page 20 of the minutes the property No. 849 Tenth Avenue appears as being valued at $12,000. In both those cases the property is made up in part of the gores or parcels of irregular shape which were not originally part of the Cozine Farm, and which are separately appraised as the Cozine gores, as will appear by the said affidavit of Alfred E. Marling, and his valuations of said gores should be deducted from the total values as stated in said list.

It appears by page 25 of the minutes that I testified that the accrued interest in the mortgages held under the deed of September 10, 1844, at the time of Mrs. Delano's death amounted to $2,720.20; that the accrued interest to said date on the securities held under the deed of 1849 amounted to $884.12, and that the accrued interest to that date on the securities held under the deed of 1865 amounted to $2,153.73.

113 I desire to add to this amount certain amounts which were received after the date of Mrs. Delano's death a full statement of all of said amounts I give below.

I have computed the commissions and expenses of administration payable on closing the trust created by the fifth clause of the will of William B. Astor and I compute the half commissions to the three trustees on the real and personal estate held by them and amounting to $405,458.88, to be $6,366.87, and I estimate the expenses of administration at $5,000, making the total deductions $11,366.87.

I desire to correct the figures stated by me, as appears by page 34 of the minutes, as follows:

$880,500 should be $890,588.75, and to that item should be added the interest accrued on said mortgages to the date of Mr. Delano's death, which amounts to $7,254.44. The market value of $25,000 Harlem River & Port Chester first mortgage bonds should be stated at $25,000 instead of $25,750. In addition to the amount of the deposit with Hottinguer & Company, Paris, there should be a statement that other cash without the State of New York amounts to $75,897.71 over and above debts.

The item of $35,049.49 stated by me on page 34 of the minutes to be made up of the accrued income on Mrs. Delano's estate, includ-

ing uncollected rents and uncollected interest and dividends, should be analyzed as will appear below.

Upon analysis I find the entire individual personal estate which was within the State of New York at the date of the death of Laura Astor Delano, together with all stocks of New York corpora-
114 tions owned by her at the time of her death to be as follows:

397 shares N. Y. C. & H. R. R. Co. stock par value $100 at 156¼	$62,031.25	
Bond of Julius Israel secured by mortgage on premises No. 143 Delancey St. Int. at 4½% May and Nov. 1	20,000.	
Accrued interest thereon	107.50	
Bond of May L. Berger secured by mortgage on No. 85 Henry St. Int. at 5 % May and Nov. 1	9,000.	
Accrued interest thereon	53.75	
Money on deposit in Union Tr. Co. with interest to June 15, 1902	971.39	
Accrued income to June 15, 1902, on trust created by deed of Sept. 10, 1844	12,818.49	
Accrued income to June 15, 1902, on trust created by deed of Sept. 6, 1849	1,308.57	
Accrued income to June 15, 1902, on trust created by deed of Oct. 28, 1865	4,750.75	
Accrued income to June 15, 1902, on trust created by 5th article of the will of William B. Astor	8,657.54	
		$119,699.24

On examination and analysis I find the value of the property of Laura Astor Delano without this State consisting of bonds secured by mortgages on property in New York State, with the interest thereon, and bonds of railroad and other corporations incorporated under the laws of New York State or of other States (all of
115 said securities being without the State of New York at the time of the death of said Laura Astor Delano), and the amount of the moneys without this State belonging to her at the time of her death to be as follows:

Bonds secured by mortgages on property in this State amounting in the aggregate to	$890,588.75	
Accrued interest thereon	7,354.44	
Bonds of railroad corporations incorporated under the laws of other States of the par value of $133,000, market value of	146,015.	
Harlem R. & Porchester 1st mtge. bonds of the par value of $25,000, market value	25,000.	

$10,000 Jersey City 6% water bonds 1909, market value	11,200.	
$10,000 Jersey City 5% assessment bonds Sept., 1923, market value	11,800.	
$8,000 New York City 3 3/10% stock, market value	8,000.	
3,065 shares Morris & Essex R. Co., market value	301,136.25	
On deposit with Hottinguer & Co., Paris, France, cash and securities	239,827.	
Cash without the State, over and above debts	75,897.71	
		$1,716,819.15

116 By instrument of appointment, dated December 23, 1901, Lucius H. Beers and I were substituted as co-trustees with Robert W. Gillespie-Stainton of the trusts created by the special English will of William B. Astor, which has been offered in evidence in this proceeding.

From documents relating to said will and said trust, it appears that the British Consols which were disposed of by said will were owned by William B. Astor at the time of his death, and that the trust still consists of these original securities; that the special English will of William B. Astor was proved in the Principal Probate Registry in London, England, on May 15, 1876, and that the physical evidence of the ownership of the securities has at all times been kept and now is in England; the said Robert W. Gillespie-Stainton being at present the trustee resident in England. From an account which I have received from him it appears that he has in his possession as such trustee British Consols of the par value of £26,825. 5 sh. 8 d., which sum at $4.86 per pound is the equivalent of $129,398.86.

FRANKLIN B. LORD.

Sworn to before me this 9th day of December, 1903.

ELI G. PARTRIDGE,
Notary Public, New York County.

117 EXHIBIT 1.

The Last Will and Testament of Laura A. Delano.

I, Laura Astor Delano the widow of Franklin H. Delano of Steen Valetje in the Town of Redhook in the County of Duchess and State of New York do make publish acknowledge and declare this as for and to be my last will and testament or instrument of appointment in the nature thereof in writing under my hand and seal in pursuance of the power and authority to me granted and reserved in and by a deed of settlement bearing date the 10th day of September in the year 1844 executed by John J. Astor William B. Astor and Margaret his wife to me the said Laura and to James Gallatin and John J. Astor jr. Trustees; and by virtue and in pursuance of the power and authority granted and reserved in a second deed of settlement bear-

ing date the 30th day of September 1848 exeexecuted by William B. Astor and Margaret his wife to me the said Laura and to James Gallatin and John J. Astor jr Trustees; And by virtue and in pursuance of the power and authority to me granted and reserved in a third deed of settlement bearing date the 6th day of September 1849 executed by William B. Astor to James Gallatin and John J. Astor jr., Trustees: And by virtue and in pursuance of the power and authority to me granted and reserved in a fourth deed of settlement bearing date the 28th day of October 1865 executed by William B. Astor to John Jacob Astor jr, William Astor and George de Forest Lord, Trustees and to me the said Laura; And by virtue and in pursuance of the power and authority to me granted and reserved in the last wills and testaments of my father William B. Astor late of the City of
118 New York, deceased and the several codicils thereto and in pursuance of every other power and authority enabling me so to do in manner and form following; that is to say:

First: I do hereby give, devise bequeath limit and appoint all and singular the sum of one Hundred and Fifty thousand dollars of the debt of the City of New York, commonly called "Water stock," particularly mentioned and described in the first mentioned deed of settlement dated September 10th 1844 or the proceeds thereof; Also all and singular that certain piece of land in the City of New York bounded Easterly by the Eighth Avenue, Northerly by 57th street, Westerly by the Hudson River and Southerly by 54th street particularly mentioned and described in said first mentioned deed of settlement and all gores and lots of land situate in the present Twenty-second Ward of the City of New York and acquired since the date of the said Trust Deed and now held under the provisions thereof and all property real or personal now or hereafter held under the provisions of said first mentioned deed of settlement; Also all and singular One Hundred thousand dollars of the Public Debt of the State of New York and One Hundred thousand dollars of the Public Debt of the state of Ohio particularly mentioned and described in the fourth mentioned deed of settlement dated October 28th 1865 or the proceeds thereof and all property real or personal now or hereafter held under the provisions of said fourth mentioned deed of settlement; Also the lot of land with the dwelling-house thereon known as No. 190 Madison Avenue, New York City with the lot and stable on 34th Street particularly mentioned and described in the second article of the fifth codicil of the will of my said father William B. Astor; Also all property real and personal held for my benefit or in which I have any interest and over which I have any power of appointment or gift under the terms of the will of
119 my said father William B. Astor or any codicils thereto including the special will and codicils therein referred to in the seventh article of the ninth codicil to the will of my said father in manner and form following to wit; One equal undivided sixth portion or share of the said property real and personal held under the provisions of said two deeds of settlement and said wills and codicils I give devise bequeath limit and appoint to John Hubert de Stuers Margaret de Stuers and Hubert de Stuers the children of my niece Margaret L de Stuers, to them their

heirs and assigns in equal shares forever. In case either of the said children should die before I do leaving issue him or her surviving, the share of the child so dying I give, devise bequeath limit and appoint to such issue in equal shares or in default of such issue living at the time of my deceased to the survivors or survivor of said three children and the issue of any deceased child in equal shares *per stirpes*.

The remaining five equal undivided six portions or shares of the said property real and personal held under the provisions of the said two deeds of settlement and said wills and codicils it is my intention to give devise and bequeath limit and appoint to *to* and for the sole use and benefit of the issue of my deceased niece Margaret A. Chanler in equal shares *per stirpes* and it is my will and desire so far as and to the extent that the powers granted and reserved to me by and under said deeds of settlement, wills and codicils will permit, that the shares of each child of my said niece shall be held in trust for the benefit of such child during the full term of his or her life. I accordingly order and direct that said remaining five equal undivided six portions or shares of said property be divided into as many equal portions or shares as there may be at the time of my decease living children of my deceased niece Margaret A. Chanler and issue of a deceased child one share being allotted for each living child and one share for the issue of each deceased child. The shares allotted for the living children of my said niece I give devise, bequeath limit and appoint to The Union Trust Company of New York In Trust nevertheless to take and hold said shares separately; one share during the full term of the natural life of each child and during the life of each such child to invest and keep invested the share allotted and held for his or her account separately and to collect receive and apply the rents income and profits thereof to the use of said child respectively free from interference or control of any person. Upon the death of each of said children the trust created for his or her benefit in his or her portion of said five-Sixths of said property shall terminate and I give devise, bequeath, limit and appoint the principal of the said portion so as above held in trust for his or her benefit with all accumulations thereof to his or her issue in equal shares *per stirpes* or in default of such issue then living, to the then surviving issue of my said niece Margaret A. Chanler in equal shares *per stirpes*. The shares allotted for the issue of any deceased child of my said niece I give devise, bequeath limit and appoint to such issue in equal shares to them their heirs and assigns absolutely and forever. I have intended to make the foregoing provisions of this my Will conformable to law and to thereby exercise to the full extent the powers of appointment vested in me under and by virtue of the provisions reserved and contained in the deeds of settlement above referred to bearing date September 10th 1844 and October 28th 1865 and in the wills and codicils thereto of my said father William B. Astor. In case however any of the foregoing devises bequests legacies, trusts, powers conditions limitations or appointments should for any reason be legally held invalid then it is my will that all of the above provisions which are valid shall stand

and that no invalidity of any other provisions or appointments shall defeat them or render them void. And in case it should be legally held that the foregoing appointment of a portion of the
121 property real and personal under the provisions of said two deeds of settlement and said wills and codicils thereto In Trust for the benefit of the children of my deceased niece Margaret A. Chanler is to any extent invalid then it is my will that to the extent that such appointment is held valid that said appointment shall remain in full force and effect and such portion of said property which is subject to or affected by any such invalidity I give devise, bequeath limit and appoint to said great-nephews and nieces respectively to them their heirs and assigns forever.

Second: I do hereby give devise bequeath limit and appoint to my nephew Arthur Astor Carey all that lot of land and dwelling-house in the Fifteenth (late Ninth) ward of the City of New York on the westerly side of Lafayette Place designated on a certain map of nine lots of land situate in the ninth ward of the City of New York the property of Seth Geer laid out into lots October 14th 1830 by Joseph F. Bridges, City Surveyor and filed in the office of the register of the City of New York by the number "Eight," bounded Easterly in front by the Lafayette Place aforesaid, Southerly by lot known on said map as, number "Seven," Westerly in the rear in part by land late of John Jacob Astor and in part by land late of John Mason, deceased and Northerly by lot known on said map as number "Nine" which said lot number "Eight" contains in breadth in front and rear twenty-seven feet and in length on each side One hundred and thirty-seven feet six inches more or less and is particularly mentioned and described in the second mentioned deed of settlement bearing date September 30th 1848 To Have and To Hold to my said nephew Arthur Astor Carey and to his heirs and assigns forever.

I also give devise bequeath limit and appoint to my said nephew Arthur Astor Carey Fifty thousand dollars of the Public Debt of the state of Ohio or the proceeds thereof particularly mentioned and described in the third mentioned deed of settlement bearing
122 date September 6th 1849 To Have and To Hold to my said nephew Arthur Astor Carey and to his heirs and assigns forever. In case my said nephew Arthur Astor Carey should die before I do I give devise bequeath limit and appoint said lot of land and dwelling-house situate on Lafayette Place in the City of New York and said sum of Fifty Thousand dollars of the Public Debt of the state of Ohio or the proceeds thereof and all property real and personal held under the provisions of said deeds of settlement respectively dated September 30th 1848 and September 6th 1849 and over which I have any power of appointment to the issue of my said nephew Arthur Astor Carey in equal shares *per stirpes.*

Third: I give and bequeath to Laura A. Chanler the daughter of my great-nephew Winthrop Chanler the sum of Ten Thousand dollars.

Fourth: It is my intention to dispose of my property and estate situate at Monte Carlo in the principality of Monaco by a separate will and I have already made and executed such a will. It is my

will that such separate will or any separate will which I may hereafter make and execute disposing of said property and estate shall be taken and read as part and portion of this will.

All the rest, residue and remainder of my estate real and personal wheresoever and whatsoever I give, devise and bequeath as follows: One-sixth thereof to John Hubert de Stuers Margaret de Stuers and Hubert de Stuers children of my niece Margaret L. de Stuers to them, their heirs and assigns in equal shares forever. In case either of said children should die before I do leaving issue him or her surviving the share of the child so dying I give devise and bequeath in equal shares to such issue or in default of such issue living at the time of my decease to the survivors or survivor of said three
123 children and the issue of any deceased child in equal shares *per stirpes.*

The remaining five-sixths of my said residuary estate I will and direct shall be divided by my Executors into as many equal portions or shares as there may be at the time of my decease living children of my deceased niece Margaret A. Chandler and issue of a deceased child, One share being allotted for each living child and one share for the issue of each deceased child. The shares allotted for the living children of my said niece I give devise and bequeath to the Union Trust Company of New York In Trust never-the-less to take and to hold said shares separately, one share during the full term of the natural life of each child and during the life of each such child to invest and keep invested the share allotted and held for his or her account separately and to collect receive and apply the rents, income and profits thereof to the use of said child respectively free from the interference or control of any person. Upon the death of each of said children the Trust created for his or her benefit in his or her portion of said five-sixth- of my said residuary estate shall terminate and I give devise and bequeath the principal of the said portion so as above held in trust for his or her benefit with all accumulations thereof to his or her issue in equal shares *per stirpes* or in default of such issue then living to the then surviving issue of my said niece Margaret A. Chandler in equal shares *per stirpes.*

The shares allotted for the issue of any deceased child of my said niece I give devise and bequeath to such issue in equal shares, to them their heirs and assigns absolutely and forever. In case the devise bequest and appointment contained in the second paragraph of the first clause of my will of one-sixth of the property therein referred to to John Hubert de Stuers, Margaret de Stuers and Hubert de Stuers and the above devise and bequest of one sixth of my residuary estate to them should fail owing to the death of all of said
124 legatees and their issue before me I then in that event give, devise bequeath limit and appoint the said one-sixth of said property real and personal in said first clause of this my Will referred to and the said One-sixth of my said residuary estate to my nephew Arthur Astor Carey or in case of his death before me to his issue in equal shares *per stirpes.*

I nominate and appoint Alphonse de Stuers the guardian of the estates of his children John Hubert de Stuers Margaret de Stuers and Hubert de Stuers during their respective minorities.

I nominate and appoint as Executors of this my Will my nephew Warren Delano jr, my nephew John Jacob Astor and my friend Franklin B. Lord.

In order to carry out any of the provisions of this my Will and in pursuance of the power to me given in and by the Trust Deeds or Deeds of Settlement, wills and codicils in this my Will referred to and every other power and authority enabling me so to do I authorize and empower my said Executors to consent to and make partition of the real estate and premises mentioned and described in the first mentioned deed of settlement and of the said gores and lots acquired since the date of said Trust Deeds and held under the provisions thereof and of any and all real estate held under the provisions of any of said deeds of settlement wills or codicils among the several devisees in whom the title thereto may vest by virtue of this instrument and for that purpose all necessary deeds and conveyances to make, execute and deliver.

In order to carry out any of the provisions of this my Will I give and grant to my said Executors full power and authority to sell either at public or private sale any or all of the real estate of which I may die seized and all necessary deeds and conveyances thereof to make execute and deliver.

I authorize and empower the Trustee of the Trusts created by this my Will to take receive and hold as permanent investments of
125 the Trusts herein created any of the securities of which I may die possessed and with the consent in writing of the respective *cestui que trust* to invest any funds remaining un-invested at any time in similar or any other securities way or form.

In Witness Whereof I have hereunto set my hand and affixed my seal at Geneva Switzerland where I am at present sojourning this Eighteenth day of October in the year of Our Lord One Thousand and Nine Hundred.

LAURA ASTOR DELANO. [SEAL.]

Signed sealed published and declared by the said testatrix as and for her last will and testament in our presence, who at her request, and in her presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses this 18th day of October A. D. 1900:

HAMILTON FISH,
Of the Town of Philipstown Putnam Co. New York State.
BENJAMIN H. RIDGELY,
Consul of the United States Malaga, Spain.
THURLOW G. PATTEISON,
Geneva Switzerland 2 Quai des Eaux-Vives.

Codicil.

I, Laura Astor Delano, widow of Franklin H. Delano, of Steen Valetie, in the town of Red Hook, County of Dutchess and State of New York, do make, publish and declare these presents as and for a Codicil to my last Will and Testament, bearing date the Eighteenth day of October, 1900.

126 *First.* Whereas by the first Clause of my said Will I do give, devise, bequeath, limit and appoint certain real and personal property therein mentioned, and which I am entitled to dispose of under and by virtue of the powers granted and reserved in certain deeds therein referred to and the Will of my father, William B. Astor, in manner following, to wit:

One equal undivided sixth portion thereof to John Hubert de Stuers, Margaret de Stuers and Hubert de Stuers, the children of my niece Margaret de Stuers, and to such of them as shall survive me, and the issue of any who shall have died before me, and the remaining five sixths to the issue of my deceased niece Margaret A. Chanler, or in trust for their benefit; and by the Fourth Clause of my said Will I give my residuary estate to the same persons in the same shares and estates.

Now therefore in order to avoid any doubt as—the intention of such provisions I direct that in case the power granted and reserved to me, by any of the said deeds, or, the said Will does not authorize an appointment of the property to which such power refers to, any one or more of such legatees, devisees or appointees, there shall be set apart to him or her out of the property which I am authorized to appoint to him or her, or if necessary out of my residuary estate, property of sufficient value to make up his or, her share to the full value of the share given or appointed or intended to be given or appointed to him or her out of all the property disposed of, or, which I intend to dispose of by the First and Fourth clauses of my said Will, and that the shares of the other legatees, devisees or appointees shall be made up, out of the residue of such property including my residuary estate.

I do further direct that in case the trusts which I desire to have established for the benefit of the issue of my deceased niece, Margaret A. Chandler shall be invalid in respect to any of the property over which I have a power of disposition under any of said
127 deeds, there shall be set apart in the establishment of said trusts out of any property covered by any other of said deeds or out of my residuary estate property of sufficient value to make up the full value of the share given or appointed or intended to be given or appointed in trust for such issue out of all the property disposed of, or, which I intend to dispose of, by the said First and Fourth Clauses of my said Will; it being my intention to give and appoint to the said John Hubert de Stuers, Margaret de Steurs and Hubert de Steurs one sixth in value of the property over which I have a power of appointment by virtue of said deeds, and the said Will, as well as of my residuary estate out of any property in respect to which such disposition is valid, and in like manner to give and appoint to the issue of my deceased niece, Margaret A. Chanler, or in trust for their benefit five equal undivided sixth in value of the property which I am so authorized to appoint and of my residuary estate, and that as between the children of my said niece and the issue of any deceased child, the shares to be held in trust for the said children shall be set apart so far as may be, out of the fund or property in respect to which I have power to create such a trust as is intended to be established by my said Will, and that in case the said trusts cannot be

established in full out of property subject to such disposition, the difference between the amount in value of the share intended for each of the children of my said niece and the amount in value of the property set apart in the establishment of the trust for such child shall vest to him, or, her absolutely.

Second. I authorize and empower my Executors, until my real estate shall have been sold or partitioned amongst the legatees, to lease the same for any lawful term of years and to receive the rents and to apply the same so far as necessary to the payment of insurance premiums, repairs and other reasonable expenses, also
128 to insure against fire, and in case of loss to collect the insurance moneys and apply the same to re-building or repairing the premises injured or destroyed or to distribute the same amongst the persons to whom the real estate is devised.

I give the same powers to the Trustee of the Trusts created by this Will.

Third. I confirm my said Will according to its intent as declared by this Codicil and as hereby modified and hereby republish the same.

In Witness Whereof I have subscribed and sealed these presents and do publish and declare the same as and for a Codicil to my last Will and Testament dated October 18th, 1900 in the presence of the Witnesses attesting the same at my request the eighth day of April Nineteen hundred and one.

LAURA ASTOR DELANO. [SEAL.]

Subscribed, sealed, published and declared by the said testatrix Laura Astor Delano as and for a Codicil to her last Will and Testament dated October 18th 1900 in our presence, who at her request in her presence and in the presence of each other have hereto subscribed our names as Witnesses this entire clause being at the same time read aloud in her and our presence and hearing this eighth day of April, A. D. 1901.

RUTHERFURD STUYVESANT
16 & 18 *Exchange Place New York*
J. LOUIS WEBB
20 *East 55th St New York.*

129 EXHIBIT 2.

Letters Testamentary.

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or whom they may concern, send greeting:

Know ye, that at the County of New York, on the 13th day of October in the year of our Lord one thousand nine hundred and two before Hon. Abner C. Thomas, a Surrogate of our said County, the Last Will and Testament of Laura Astor Delano deceased was proved, and is now approved and allowed by us; and the said deceased

having been at the time of her death a resident of Monte Carlo, principality of Monaco leaving personal property within the County of New York by means whereof the proving and registering said Will and the granting Administration of all and singular the goods, chattels and credits of the said Testatrix and also the auditing, allowing and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels and credits of the said deceased and any way concerning her Will, is granted unto John Jacob Astor and Warren Delano Jr., each of the City of New York, N. Y. and Franklin B. Lord, of Lawrence, N. Y., the Executors in the said Will named, they being first duly sworn well, faithfully and honestly to discharge the duties of such Executors.

In testimony whereof, we have caused the Seal of Office of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Hon. Abner C. Thomas, a Surrogate of our said County of New York at said County, the 14th day of October in the year of our Lord one thousand nine hundred and two.

[SEAL.] J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

130 EXHIBIT 3.

Affidavit of Alfred E. Marling.

Surrogates' Court, County of New York.

In the Matter of the Transfer Tax upon the Property Transferred and Appointed by the Last Will and Testament of LAURA ASTOR DELANO. Deceased.

COUNTY OF NEW YORK, *ss:*

Alfred E. Marling, being duly sworn, saith:

For upwards of twenty years past I have been engaged in business in the City of New York as a real estate broker, agent and appraiser. During the latter part of such period I was, and now am, a member of the firm of Horace S. Ely & Company in said city.

During said period of twenty years, I have been continuously engaged in the business of buying, selling and renting real estate, particularly real estate situated on the Island of Manhattan and in advising with respect to making of loans on such real estate, and for that purpose I have made a special study of the values of real estate on said Island of Manhattan.

For the purpose of the assessment of the transfer tax herein, I was requested by the executors of the will of Laura Astor Delano to make a valuation of the real estate of which she died seized and which was devised by her will. For the purpose of such valuation

I made a special study of the values of said lands, and re-
131 ported to said executors that, in my judgment, the values on June 15, 1902, the date of Mrs. Delano's death, were as follows:

341	Fifth Avenue, lot and building, valued by me at			...	$135,000
343	do	do	do	...	135,000
345	do	do	do	...	140,000
347	do	do	do	...	140,000
67	Third Avenue	do	do	...	30,000
					$580,000

ALFRED E. MARLING.

Sworn to before me this 3rd day of December, 1903.
ELI G. PARTRIDGE,
Notary Public, New York County.

EXHIBIT A.

Deed of William B. Astor, Dated September 30, 1848.

To all to whom these presents shall come, William Backhouse Astor of the City of New York, Merchant, and Margaret his wife send Greeting:

Whereas the said William B. Astor, having purchased the house and land hereinafter mentioned, for the use of his daughter Laura, wife of Mr. Franklin H. Delano, and having also in a testamentary paper by him recently made, spoken of the same as given to her, is now desirous of settling the same in manner hereinafter expressed; which land and premises are the same in which she and her husband now reside: Now these presents witness, That the said William B. Astor and Margaret his wife, in consideration of the natural love and affection which they bear to the said Laura and
132 the other persons hereinafter entitled, and in further consideration of One Dollar to the said William B. Astor and Margaret his wife, by the said Laura and the said other persons entitled (the receipt of which is hereby acknowledged) they the said William B. Astor and Margaret his wife, have granted, bargained and sold and conveyed and by these presents do grant, bargain, sell and convey unto the said Laura wife of Franklin H. Delano All that Lot of Land and Dwelling House in the Fifteenth formerly Ninth Ward of New York on the Westerly side of Lafayette Place and is distinguished on a certain map of nine lots of land situated in the ninth ward of the city of New York, the property of Seth Geer laid out into lots October 14, 1830 by Joseph F. Bridges, City Surveyor, and filed in the office of Register of Deeds for the City of New York, by the number Eight (8): Bounded Easterly in front of Lafayette Place aforesaid: Southerly by lot known on the said map as number Seven (7): Westerly in the rear

in part by land of John Jacob Astor deceased and in part by land lately of John Mason deceased, and Northerly by land known on said map as number nine (9): which lot number eight contains in breadth in front and rear twenty seven feet and in length on each side one hundred and thirty seven feet, six inches, be the same more or less. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof: and all the right of dower of the said Margaret Astor and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law or in equity, of them the said William B. Astor and Margaret his wife of and in the same with the appurtenances: To have and to hold the said land and premises unto the said Laura for her life,

133 unless and until she or her husband to whom she may be married or any one claiming under or against them or either of them shall at any time or in any manner, by deed, contract, gift, grant, judgment, decree, execution, claim in equity, attachment or other act or default make, create or allow, suffer or permit to be made or created any sale, charge, incumbrance or other disposition of the said lands (excepting the leases, sales or mortgages hereinafter authorized) or of the rents, issues or profits thereof or any of them or any part thereof or of any interest therein; in any of which cases the life estate, of the said Laura hereby granted shall cease and determine: And the said William B. Astor and Margaret his wife, in consideration as aforesaid, do in any such event, and upon and from any such determination of the estate of the said Laura do grant and convey all and singular the said premises with their appurtenances unto James Gallatin and John Jacob Astor son of the said William B. Astor and their heirs as joint tenants in trust to receive the rents, issues and profits thereof during the life of the said Laura and to apply the same to her use.

And the said William B. Astor and Margaret his wife, in consideration as aforesaid do grant all and singular the said premises with their appurtenances from the death of the said Laura unto her issue surviving her, if any, and their heirs and assigns forever taking *per stirpes* and in default of such issue, or in case of any such issue not attaining the age of twenty one years, then the said William B. Astor and Margaret his wife do grant the said land or the share of such issue therein or which such issue would if surviving have taken, unto the brothers of the said Laura and her sister Alida and their children and issue, as they may then survive, taking *per stirpes:* to have and to hold to them and their heirs forever.

Provided however and power is hereby granted unto the

134 said Laura, in her discretion to give the said land and premises or any share or part thereof to and amongst her said issue, brothers, sister Alida, or their issue, in such manner and proportions as she may appoint by instrument in its nature testamentary to be acknowledged by her as a deed in the presence of two witnesses or published by her as a will.

Provided also, that it shall be lawful for the said Laura, with the

concurrence of her husband and James Gallatin and John Jacob Astor or of any two of them to make any lease of the premises for any lawful term of years, with such covenants as they may think expedient for the advantage of the property, provided that the rents and benefits reserved on the said leases shall be payable annually or at shorter periods to the parties entitled in possession and remainder according to their respective interests and no premium or fine shall be taken for or upon any such lease.

Provided also and it shall be lawful for the said Laura with the like assent and concurrence to sell or mortgage the said lands in fee simple on condition that the money be paid to the said James Gallatin and John J. Astor and, in case of a sale, held invested on the same trusts and limitations of estate as the lands sold, and in case of mortgage be applied to rebuilding, repairing or improving the mortgaged premises, for which purpose only is the same to be mortgaged: and the acquittances of the said trustees shall discharge the purchaser or mortgagee from the obligation to see to the application of the purchase money.

Provided also, that the said Laura may and she is hereby, empowered in her discretion from time to time to appoint any other person or persons as substitutes for the said James Gallatin and John Jacob Astor in all their estate, interest, powers and offices under
135 this deed, in case they or either of them shall die, remove from this State or decline the further execution of the duties in these presents expressed. And upon such appointment being made, such substitute shall take and have, in all respects, the estate, authority, interest and office of him in whose place he may be appointed and the proper conveyances may be made to him: And so on, from time to time as the said named parties or the substitutes and successors appointed in their place, shall die remove or decline.

And provided further, that it shall be lawful for the said William B. Astor and Margaret his wife, and the survivor of them, at any time during the life of the said Laura to appoint, convey and settle the said land and premises hereby granted to her sole and separate use in equity, notwithstanding her coverture with remainders as to them or the survivor of them may seem fit.

And the value of the said premises as an advancement to the said Laura is declared to be eighteen thousand five hundred dollars.

In Witness whereof the said William B. Astor and Margaret his wife, and the said James Gallatin and John Jacob Astor have hereunto set their hands and seals this thirtieth day of September in the year one thousand, eight hundred and forty-eight.

WM B ASTOR [L. S.]
MARGARET ASTOR [L. S.]
JAS. GALLATIN [L. S.]
J. J. ASTOR JR. [L. S.]

Sealed and delivered in the presence of (The words "five hundred being interlined on this page.)
W. W. BRUCE.

136 STATE OF NEW YORK
City and County of New York ss:

On this twenty fifth day of October in the year One thousand eight hundred and forty eight before me personally came William W. Bruce to me known who being duly sworn says he resides in the City of New York and knows William B. Astor Margaret Astor, James Gallatin and John Jacob Astor Junior to be the individuals described in and who executed the foregoing Instrument.—That deponent was present at the execution thereof and saw the said William B. Astor, Margaret Astor, James Gallatin and John Jacob Astor Junior sign their names thereto and that they duly acknowledged the execution thereof whereupon this deponent became a subscribing witness to such execution.

A. B. AMERMAN,
Commissioner of Deeds.

EXHIBIT B.

Deed of William B. Astor, Dated September 6, 1849.

These presents witness—That William B. Astor of the city of New York, in consideration of his love and affection to Laura (wife of Mr. Franklin H. Delano,) his daughter and in consideration of one dollar to him paid by James Gallatin and John Jacob Astor Jr., hath given, granted and transferred and doth give, grant and transfer to them, Fifty thousand dollars of the Public Debt of the State of Ohio, the certificates for which are herewith delivered, to have and to hold the same to them, the survivor and successors of them, upon the trusts hereinafter declared, namely:

137 To receive the interest and income thereof and to apply the same, as it shall be received, to the use of the said Laura during her life, free from the disposal or incumbrance of her husband present or future and as her separate estate which application to her use may be made by payment to her on her own receipt, but not by way of anticipation: and she or her husband at her request may be authorized to receive such interest and income for her use, if the trustees shall from time to time think fit.

And upon the further trust, upon her death to transfer and convey the capital of the said stock to the issue of the said Laura surviving her, *per stirpes*, and to their executors and administrators; provided they shall attain the age of twenty one years or die under that age leaving issue. But if she shall leave no issue surviving her then to transfer the said capital, to her surviving brothers and sister Alida and to the issue of any of them who may have deceased leaving issue then surviving, such issue to take such share as their parent if living would have taken.

And, if any of the issue of Laura shall die under the age of twenty one years without surviving issue then the share of the said capital to which the deceased would have been entitled at the said age shall be conveyed to her brothers and sister Alida and the surviving issue

of any of them who may be deceased, taking their parents' share as aforesaid.

But the said capital is not to be transferred to the persons thus designated until they shall respectively attain the age of twenty one years; and until that time, the said trustees shall retain the respective shares of those who shall be under such age in their hands and apply the income thereof to the use of such minors, ac-
138 cumulating any surplus of their respective shares, to be conveyed with the said capital when it shall be transferred, to the persons entitled as above.

Provided however that it shall be lawful for the said Laura, by any instrument executed duly as a will of personal estate, to dispose of the said capital unto and amongst her issue, brothers, sister and their issue, in such shares and proportions as she may think fit and upon such limitations, by way of trust or otherwise as in her discretion may be lawfully devised.

And Provided further, that the said trustees (the assent of the said Laura being first given if she be living) may sell or dispose of the said stock and invest the proceeds, and also the amount of the said debt and of any substituted debt if paid off, in the public debt of the United States or of the State or City of New York or on bonds secured by mortgages of productive real estate; and may in like manner from time to time change all substituted investments by such disposal and by reinvestment in other securities within the above enumeration; but the fund, into whatever form, it may thus be changed, shall stand upon the same trusts, limitations of interest and powers as are herein expressed both as to income and capital.

Provided also, that in the event of the said trustees or any trustee from time to time substituted shall die or remove from the State of New York or decline the further execution of the trusts, the remaining trustee shall, (on the nomination of the said Laura during her life) appoint a new trustee from time to time by deed duly acknowledged, who shall thenceforth have all the interest, trust and power of him for whom he shall be substituted and the needful conveyances to him shall be executed.

139 In Witness whereof the said William B. Astor and the above named trustees have hereunto set their hands and seals the sixth day of September, in the year of our Lord, one thousand, eight hundred and forty nine.

WM. B. ASTOR. [L. S.]
JAS. GALLATIN. [L. S.]
J. J. ASTOR, JR. [L. S.]

Sealed and delivered in the presence of
WM. W. BRUCE.

Nos. 21667 @ 21,671. 5 certificates $10,000 each. Ohio Canal 6's. 1860 in the names of Jas. Gallatin & John Jacob Astor Jr. dated 6 Sept. 1849.

EXHIBIT C.

Deed of William B. Astor and Others, Dated September 10, 1844.

To all to whom these presents shall come, we John Jacob Astor of the City of New York Merchant and William Backhouse Astor of the City of New York, Merchant and Margaret his wife, send Greeting:

Whereas upon a contemplated marriage of Laura daughter of William B. Astor and grand daughter of John Jacob Astor they are desirous of making a provision by way of settlement to her use in the manner hereinafter expressed: and for this purpose to appropriate the land hereinafter expressed to be granted which was conveyed by the said John Jacob Astor to the said William B. Astor by deed bearing date the twenty second day of February in the year eighteen hundred and forty two: and also One hundred thousand dollars City Water Stock parcel of five hundred thousand dollars of said Stock transferred by the said John Jacob Astor to the said William B. Astor on or about the eighth day of September in the year of
140 our Lord one thousand eight hundred and forty one, and also a further sum of Fifty thousand dollars of the New York City Water Stock herewith transferred to James Gallatin and John Jacob Astor the younger trustees for certain purposes of this settlement. Now know all men by these presents that in consideration of the natural love and affection which the said John Jacob Astor and William Backhouse Astor bear to the said Laura Astor, and in consideration of one dollar to them paid by the said Laura Astor, James Gallatin and John Jacob Astor the younger (the receipt of which is hereby acknowledged) they the said John Jacob Astor and William B. Astor, have granted and given and do hereby grant and give unto the said Laura Astor the interest and income of the said One hundred and fifty thousand dollars of the Debt of the City of New York commonly called the Water Stock, (the certificates of which now are delivered to the said James Gallatin and John Jacob Astor the younger) and of all moneys to be received thereon and of any investments which may in any event be substituted therefor, to be had, holden, taken and received by the said Laura for her life, unless and until she or her husband to whom she may be married, or any one claiming under or against them or either of them shall, at any time or in any manner by deed, contract, gift, grant, judgment, decree, execution, claim in equity, attachment or other act or default, make, create or allow, suffer or permit to be made or created any sale, disposition, charge or incumbrance of any then accruing or future payments of such income or interest or any part thereof: in any and every of which cases the right and interest of the said Laura or of her husband in such interest and income shall cease: and in consideration as aforesaid the said John Jacob Astor and William Backhouse Astor do give and grant the income and interest of the said Stock or its substitute or the money thence to be derived, from and after

any such termination of the said right and state of the said
141 Laura or her husband, unto the said James Gallatin and John Jacob Astor the younger, as trustees during her life to receive the said interest and income to apply the same to the use of the said Laura. And the said James Gallatin and John Jacob Astor the younger are to execute revocable Letters of Attorney from time to time as required by the said Laura authorizing her or her husband to receive the interest on the said Stock or the moneys thence to be derived. And in consideration as aforesaid the said John Jacob Astor and William Backhouse Astor do give and grant the capital of the said One hundred and fifty thousand dollars, on the death of the said Laura to her surviving issue, in such manner and proportions as she may in her discretion (as by an express power) appoint by instrument in the nature of a will: and in default of such appointment, to such issue, in equal shares *per stirpes:* Provided however that an express discretionary power is hereby granted to her to give not exceeding one fourth part thereof by will to her husband surviving her: And in case the said Laura shall leave no surviving issue, or in case any of such issue shall depart this life under the age of twenty one years, then the share or shares which would have gone to such issue, shall be and are hereby given to the persons who would be legal representatives of the said Laura by consanguinity only and if the said Laura shall die leaving no issue, the further express power is given to her to appoint the said Capital to and amongst such representatives, or any of them in such shares and manner as she may think fit and to give to her husband not exceeding one fourth part as aforesaid.

And furthermore the said William Backhouse Astor and Margaret his wife in consideration as aforesaid do grant and give unto the said Laura Astor their daughter: All that piece and parcel of
142 land in the City of New York bounded Easterly by the Eighth Avenue, Northerly by Fifty seventh Street, Westerly by the Hudson River and Southerly by Fifty fourth Street, together with all and singular the hereditaments and appurtenances thereof and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof and all dower and right of dower of said Margaret therein: to have and to hold the said now granted lands and premises unto the said Laura Astor for life, unless and until she or her husband to whom she may be married or any one claiming under or against them or either of them, shall, at any time or in any manner, by deed, contract, gift, grant, judgment, decree, execution, claim in equity, attachment or other act or default, make, create, or allow, suffer or permit to be made or created any sale, charge, incumbrance or other disposition of the lands hereby granted, excepting the leases, sales or mortgages hereinafter authorised, or of the rents, issues or profits thereof or any of them or any part thereof or of any interest therein in any of which cases the life estate to the said Laura hereby granted shall cease and determine: and, in consideration as aforesaid, the said William B. Astor and Margaret his wife, do give and grant, upon and from any such determination of the estate of the said Laura, all and singular the said lands with their

appurtenances unto the said James Gallatin and John Jacob Astor the younger and their heirs as joint tenants, in trust, to receive the rents, issues and profits of the said lands during the life of the said Laura and to apply the same to the use of the said Laura.

And in consideration as aforesaid, the said William Backhouse Astor and Margaret his wife, do grant all and singular the said lands and the rents, issues and profits thereof, with all their appurtenances, from the death of the said Laura unto her surviving issue and their heirs and assigns forever, taking *per stirpes:* and in default
143 of such issue, or in case of any such issue not living to attain the age of twenty one years, then the said lands or the share of such issue therein or which such issue would have taken, are hereby granted unto persons who would be the heirs at law of the said Laura by consanguinity to be had and holden to them and their heirs forever.

Provided however, and power is hereby granted unto the said Laura in her discretion to give the said lands or any share or part thereof to and amongst her said issue or heirs, in such manner and proportions as she may appoint by instrument in its nature testamentary, to be acknowledged by her as a deed and in presence of two witnesses or published by her as a will.

Provided also, that it shall be lawful for the said Laura, with the concurrence of her husband and the said James Gallatin or John Jacob Astor the younger, or of the two latter from time to time to make any lease or leases of the said lands or any part thereof for any term or terms of years not exceeding twenty one years from the date of the leases respectively, with covenants or conditions for the payment for valuable erections thereon, if they shall think fit, but the rents and benefits reserved on the said leases shall be payable or reserved annually or at shorter periods to the parties who shall be entitled in possession or remainder, and no premium or fine shall be taken for or upon any such leases.

Provided also, and it shall be lawful for the said Laura, with the like assent and concurrence, to sell or mortgage, of the said lands not more than one third in value, and the same to convey in fee simple to any purchaser or mortgagee, on condition that the moneys derived from such sales or mortgages shall be paid or secured to be paid to the said James Gallatin and John Jacob Astor the
144 younger or the survivor of them to be applied to improvement of the residue of the said lands by improvements of a permanent character: and the acquittances of the said persons so assenting or concurring shall discharge the grantees or mortgagees and establish the conveyances or mortgagees free from any obligation or condition as to the purpose of the sale or mortgage, the quantity or portion sold or mortgaged or the application of the money paid.

And provided further, that the said Laura is expressly authorised to appoint any other person or persons as substitutes for the said James Gallatin or John Jacob Astor the younger, in all their estate, interest, powers and offices under this deed, in case they or either of them shall die, remove from this State or decline the further execu-

tion of the duties in these presents expressed: and upon such appointment being made, such substitute shall take and have in all respects the estate, interest, authority and office of him in whose place he may be appointed and the proper conveyances may be made to him: and so on from time to time, as the said named parties or the substitutes and successors appointed in their place shall die, remove or decline.

And Provided further, that it shall be lawful for the said William Backhouse Astor and Margaret his wife and the survivor of them, at any time during the life of the said Laura, to appoint, convey and settle the estate and interest hereby granted to her, to her sole and separate use in equity notwithstanding any coverture to which she may be subject. And it is hereby declared by the said John Jacob Astor and William Backhouse Astor, that the lands and stock hereby conveyed are by them estimated as of the value of two hundred thousand dollars and upwards: and the same are to be, to the extent of that sum an advancement by the said William Backhouse
145 Astor for the said Laura (of her inheritance under his will)

In Witness whereof the said John Jacob Astor, William Backhouse Astor and Margaret his Wife, Laura Astor, James Gallatin and John Jacob Astor the younger, have hereunto set their hands and seals this tenth day of September in the year of our Lord, one thousand eight hundred and forty four.

J. J. ASTOR. [L. S.]
WM. B. ASTOR. [L. S.]
MARGARET ASTOR. [L. S.]
LAURA ASTOR. [L. S.]
JAS. GALLATIN. [L. S.]
J. J. ASTOR, JR. [L. S.]

Witness:
W. W. BRUCE.

STATE OF NEW YORK,
City & County of New York, ss:

On this 16th day of November A. D. 1859 before me personally came Wm. W. Bruce subscribing witness to the above instrument to me known who being by me duly sworn says that he resides in the City of New York he was acquainted with John J. Astor and Wm. B. Astor and knew them to be the individuals described in and who executed the said instrument that he saw them sign the same that they acknowledged in his presence that they executed the same and that he the said Wm. W. Bruce subscribed his name as a witness thereto

WM. LEE,
Com. of Deeds.

STATE OF NEW YORK,
City & County of New York, ss:

On this 16th day of November A. D. 1859 before me personally came Margaret Astor wife of Wm B Astor known to me to be
146 one of the individuals described in and who executed the above instrument and who acknowledged to me on a private examination by me separate and apart from her husband that she executed the same freely and without any fear or compulsion of her said husband WM LEE *Com of Deeds*

EXHIBIT D.

Deed of William B. Astor, Dated October 28, 1865.

These Presents made the twenty eighth day of October in the year of our Lord, one thousand, eight hundred and sixty five.

Between William Backhouse Astor of the City of New York of the one part, John Jacob Astor, Junior, William Astor and George De Forest Lord, of the same city, of the second part, and Laura wife of Franklin H. Delano, on behalf of herself and her representatives hereinafter expressed or described, of the third part.

Whereas the party of the first part is minded to make a further provision, independent of any heretofore made or hereafter to be made by him for his said daughter and her representatives, and not to be taken as an advancement or ademption of any legacy or provision for them; and in pursuance of such purpose hath at the same time with the delivery of these presents transferred to the parties of the second part as Trustees, One hundred thousand dollars of the Public Debt of the State of New York, and One hundred thousand dollars of the Public Debt of the State of Ohio, at par. To have and hold, manage and dispose of the same upon and for the
147 Trusts and on the conditions and for the purposes and with the powers herein declared in respect of the said sums amounting as aforesaid to Two hundred thousand dollars: That is to say, that the parties of the second part, the survivors and survivor of them, and their successors in the Trust, receive the income of the said sum and of every part thereof and of any property which may be substituted therefor according to the provisions hereinafter contained, and after defraying all just charges and indemnities to apply the income thereof, so long as the same shall not be attempted to be withdrawn from the possession and management of the said Trustees or their successors in the Trust, nor be subjected to any debts, claims, assignments or incumbrances of any kind, of any other persons created or arising from the act or default of my said daughter, her husband or his or her representatives, to the use of my said daughter during her life.

And on her death or other termination of the Trust, to divide and distribute the Capital of the said funds, to and among her issue, then surviving, to be equally divided among them, the issue representing their parents respectively: But, in case any of the

said issue shall depart this life before attaining the age of twenty one years without surviving issue, the share of such deceased shall be accounted for and vested in the surviving brothers and sisters, if any of the person so deceased: And the portions or shares of such deceased under age shall continue to be managed by the said Trustees and their successors in office, until the termination of the infancy of the person and persons entitled thereto.

And in case the said party of the third part shall depart this life without issue surviving her, or in case any issue surviving her shall not attain the age of twenty one years, then the share or portion of the said party or her said issue, shall be vested in the
148 brothers and sisters of my said daughter, and in my grand daughter Margaret A. Chanler, or in their issue surviving, according to representation of children to their parents shares respectively in all cases.

Provided however and these presents are on the limitations and condition further: That it shall be lawful for my said daughter, party of the third part by any instrument testamentary in its nature and executed as such, to give, appoint and bequeath the said sum now settled and any part and parcel thereof to and amongst my children or their issue or any one or more of them who may survive her in the event of her death without surviving issue or of the death of such issue under the age of twenty one years.

Provided also that my said daughter may in her discretion to be exercised or withheld at her pleasure, by an instrument in nature of a Will give any amount not exceeding one half of the Capital to her husband if he shall survive her.

And it is further witnessed: That it shall be lawful for the said parties of the second part and the survivors or survivor of them and their successors on the Trust, in their discretion to sell and convey all or any part of the said Trust property and to reinvest the same in their discretion, and so from time to time with the reinvestments made during the Trust, in Bonds secured by Mortgage of unincumbered real estate in the City and County of New York and in the Public Debt of the United States of America and of the States of Pennsylvania, Massachusetts, Ohio and New York, or in of such Public Debts, in whole or in part. But no such change of investments shall be made against the consent of my said daughter.

And it shall be lawful for the Trustees and their successors
149 in the Trust to make revocable powers of attorney from time to time, but not against the consent of my said daughter to authorize any person or persons as their attorney or attornies to receive and pay over the income of the Trust funds, from time to time, while the acting Trustees shall think it discreet so to do.

And in case of the absence from the State or inability of any sort of any of the said Trustees or their successors, it shall be lawful for the remaining and resident Trustee to receive and apply all the income, according to the terms of the Trust.

Provided also, and it is hereby expressed, that in case of the death or resignation of any of the Trustees or their successor in office, it shall be lawful for the remaining or surviving Trustees

or Trustee to appoint and associate a new Trustee or Trustees from time to time to whom proper conveyances shall be made according to the same Trusts as are herein expressed, but no such Trustee shall be appointed against the consent of my daughter or her representatives, party of the third part.

And it is expressly provided; That the accounts which shall from time to time be rendered by the said Trustees or their successors, on the request of the party of the third part, or on their own motion, shall be taken and deemed just and true and a complete protection and indemnity to them, unless intentional fraud shall be affirmatively shown and proved: And the said Trustees and their successors shall be indemnified in all their lawful proceedings in the premises out of the income and capital of the Trust property.

In witness whereof the parties of the first and second parts have hereunto interchangeably set their hands and seals the day
150 and year first above written; the party of the third part not being required so to do.

WM. B. ASTOR. [L. S.]
J. J. ASTOR, JR. [L. S.]
WM. ASTOR. [L. S.]
GEORGE DE FOREST LORD. [L. S.]

Sealed and delivered in the presence of, one alteration in page 2 before signing, as to all the parties,
DANIEL LORD.

EXHIBIT E.

A Will of William Backhouse Astor of the City of New York, Merchant.

I William Backhouse Astor of the City of New York Merchant in order to make the disposition hereinafter expressed of the amount which at my decease I shall hold or be entitled to in the Public Debt of The United Kingdom of Great Britain and Ireland commonly called three per cent. Consols do devise and bequeath in manner following:

First: To my dear wife Margaret I give the income of ten thousand pounds sterling (of par) during her life; with power to her by any instrument of appointment in the nature of a will to give the capital at her death to all of our children and issue or to any one or more of them in such sums or proportions as she may think fit; and in case she chooses not to make any such appointment I give the capital to my two sons John and William; in case of the death of either of my said sons leaving issue surviving her, the issue shall take their parents share, and in case of the death
151 of either without issue surviving her, his share shall accrue to his brother, or his surviving issue if he be deceased.

Second: To my dear daughter Alida wife of John Carey, Jr., Esqre., I give the income of ten thousand pounds sterling (at par).

To my dear daughter Laura wife of Franklin H. Delano, Esqre., I give the income of ten thousand pounds sterling (of par).

To my dear granddaughter Margaret wife of J. Winthrop Chanler Esqre. I give the income of the like sum of ten thousand pounds sterling of par. And I direct that the capital of each of the said legacies be retained by the Executors or Executor of this Will and the income paid over as received to the separate use and on the separate receipt of the said three ladies respectively and not by anticipation nor to be subject to the control debts or engagements of them or their husbands respectively: But the Executors or Executor may, so long as they shall see fit to permit the same, authorize the said ladies respectively by a power of attorney revocable, to receive the said income to them respectively appertaining.

Third: On the death of my said daughters in the second Clause above named respectively, I give the capital sum of which she was to have the income to her surviving issue, taking *per stirpes* if of different degrees of kindred; if she shall leave no surviving issue, I give the capital to her brothers and sisters and the surviving issue of deceased brothers and sisters taking *per stirpes*.

On the death of my said granddaughter I give the capital of which she is to have the income to her surviving issue who shall attain the age of twenty-one years *per stirpes:* in default of such issue attaining such age I give the capital to my said two sons and daughters and the issue of any of them who may be deceased *per stirpes*; the income for such issue under age to be applied to their use.

152 And I give to each of the said daughters and to my granddaughter the power, notwithstanding the above limitations of capital, to dispose thereof to and amongst her kindred of my blood or any of them in such sums or proportions as she may think fit, so that the same may be done by an instrument of appointment testamentary in its character and execution.

Fourth: The residue of my said British Consols, and all sums which may not be effectually disposed of by the foregoing dispositions, I give to my sons John J. Astor and William Astor and if either or both shall have died leaving issue, each issue shall take their parent's share by representation, or if either shall die without surviving issue his brother or his brother's surviving issue shall take the whole of such residue and sums not effectually disposed of.

Fifth: I appoint my said two sons John Jacob Astor and William Astor and my friend Alexander Gillespie of London or in case of his death or declining, Robert Gillespie of London in his place, to be executors of this Will and Trustees of the said four sums of ten thousand pounds each; with the power to act by revocable delegation, also in their discretion to sell the said funds in part or in whole and in reinvest the proceeds in other safe securities of the United Kingdom or of the United States of America or the State of New York, so from time to time; and the said English Executors and Trustees are to receive the ordinary Bankers Commission for their services in the management of the property in the same manner as if they were not Trustees; and they are to be indemnified for all their expenses and lawful or just charges.

And I declare and direct that this is to be deemed a special and limited Will applicable to the said British Consols only and not to affect nor to be affected by any other testamentary paper
153 by me made or to be made unless expressly referring to this property and this Will—I revoke all other dispositions of this British Debt.

In witness whereof I have subscribed these presents as a Will and declare the same as such in presence of the witnesses attesting the same at my request at New York this twenty-seventh day of June in the year of Our Lord one thousand eight hundred and sixty-two.

WM. B. ASTOR.

Subscribed by Wm. B. Astor as a Will in our presence attesting the same at his request and in presence of him and of each other this twenty-seventh day of June, A. D. 1862.

DANIEL LORD,
34 *West* 17 *Street, New York.*
PATRICK HOGAN,
49 *Willow Street, Brooklyn.*

By this codicil to my special disposition of my British Consols dated June 27, 1862.

I William Backhouse Astor do bequeath, devise and dispose as follows:

I give, by way of increase of the amounts in the first and second clauses of such special disposition, Ten thousand pounds sterling of the par of the stock (in all Forty thousand pounds) being for my wife, my two daughters and for my granddaughter Margaret A. Chanler; so that Twenty thousand pounds shall be the capital sum, of which the income and power of disposal shall be appropriated to each, and shall be and is both as to capital and income limited, given and disposed of according to the terms of the said Will applicable to each person and sum respectively, and in the same manner, in all respects, as if Twenty thousand pounds had in each instance
154 been originally written in the place of Ten thousand pounds.

And as to such increased amounts, namely Twenty thousand pounds sterling in each instance, and as to each person respectively and her representatives, I apply all and singular the provisions of my said disposition of Consols as are respectively applicable; which disposition is to be applied exclusively to British Consols and shall not interfere with or be interfered with, by the other dispositions of my estates.

In witness whereof I have subscribed this as a Codicil to my said Will of June 27, 1862, and declare the same to be such, in presence of the witnesses attesting the same, this twelfth day of April in the year of our Lord one thousand eight hundred and sixty-four.

WM. B. ASTOR.

Subscribed by William B. Astor as a Codicil to his Will dated June 27, 1862, and so declared by him in our presence subscribing the

same as witnesses at his request and in presence of him and of each other April 12, 1864.

DANL. LORD,
34 *W.* 17 *Street, N. York.*
HENRY DAY,
No. 47 *W* 19 *St. N. York.*

A further codicil to the Will of William Backhouse Astor which bears date the twenty-seventh day of June in the year of our Lord, eighteen hundred and sixty-two.

As to the sum of Twenty thousand pounds British Consols, mentioned in the first Clause of the said Will and the Codicil thereto, which on the death of my dear wife Margaret are limited to my sons John and William or their issue, in default of her appointment of the same, I direct devise and bequeath in relation to the said
155 sum of Twenty thousand pounds if not duly appointed and given by my wife in manner following:

First. I give to the use of my daughter Mrs. Alida Carey the income of one third part thereof for her natural life, and on her death I give the capital to her surviving issue, and if leaving no surviving issue, I give the same third part to her brothers and sister and the surviving issue of deceased brothers and sisters, and with the like power of appointment as is contained in second and third Clauses of my said will.

Second. I give to the use of my daughter Mrs. Laura Delano the income of one other third part of the said Twenty thousand pounds for her natural life, with a like limitation on her death and a like power of appointment.

Third. And I give to the use of my granddaughter Mrs. Margaret A. Chanler, the income of the other third part of the said Twenty thousand pounds for her natural life, with like limitation on her death and a like power of appointment.

And the limitations to my sons John and William of the said Twenty thousand pounds are revoked.

Fourth. Should there be any impediment in the law to giving clear effect to my dispositions of my property embraced in my said Will of June 27, 1862, by separate probate thereof, or letters testamentary thereon or by a separate testamentary instrument, then I authorize my Executors to carry out the same by delegating to the Executors named in this Will, all the powers needed to carry out the provisions thereof, which delegation shall have the like effect in all questions of account and administration as if directly sanctioned by me.

156 In witness whereof I have subscribed this as a Codicil to my said Will of June 27, 1862, and declare the same to be such in presence of the witnesses attesting the same, this nineteenth day of January in the year of our Lord one thousand eight hundred and sixty five.

WM. B. ASTOR.

Subscribed by Mr. Wm. B. Astor as a Codicil to his Will dated June 27, 1862, and so declared by him in our presence subscribing

the same as witnesses at his request and in presence of him and of each other—1865 January 19.

DANIEL LORD,
34 *West* 17 *Street, New York.*
GEORGE DE FOREST LORD,
34 *W.* 17 *Street, N. York.*

I, William B. Astor of the City of New York having before me my Special Will or testamentary disposition of my British Consols, bearing date the twenty-seventh day of June eighteen hundred and sixty-two, with the two Codicils thereto dated respectively April 12, 1864 and January 19, 1865, do hereby make, publish and declare this further Codicil thereto, that is to say:—

First. I revoke those provisions of said Special Will or disposition and the first Codicil thereto by which the capital of the sum of ten thousand pounds sterling, increased by the said first Codicil to twenty thousand pounds, of which my granddaughter Margaret A Chanler is to receive the income for life, is given upon her death to her surviving issue who shall attain the age of twenty-one years per stirpes and in default of such issue attaining such age is limited over otherwise, and in lieu thereof I give the capital of the said twenty thousand pounds sterling, upon the death of my said granddaughter Margaret A Chanler, to her issue who shall survive her,
157 absolutely, in equal shares, per stirpes and not per capita, and should she leave no issue her surviving, then in equal shares to my sons John and William and my daughters Alida and Laura, or such of them as shall survive said Margaret, and to the then surviving issue of such of them as shall die before her leaving issue who shall survive her, such issue taking per stirpes and taking collectively only the share which my son or daughter, whose issue they are would have taken if living.

Second. I declare that the person named Robert Gillespie in said original special Will or disposition as one of the Executors thereof, and whom I then intended and now intend and appoint as such Executor, was at the time of making such original special Will Robert Gillespie Junior, but is now Robert Gillespie.

Third. In case from any legal difficulty or impediment, my said special Will or disposition of June 27, 1862, as varied by the Codicils thereto, cannot receive probate or take effect as a separate testamentary disposition of my said British Consols, independent of and disconnected from my general last Will and testament which bears date June seventeenth, eighteen hundred and fifty six, and to which there are several codicils, then I will and declare that said special will or disposition of June twenty seventh, eighteen hundred and sixty two, in connection with and as varied by the several Codicils thereto including this one shall take effect by way of further Codicil to my said general Will of June seventeenth, eighteen hundred and fifty six, and to that end I do hereby republish said Special Will and its two Codicils all of which are hereunto annexed, in connection with this Codicil, and as varied by said successive codicils including this one, to stand in case of need, by way of further codicil to my said

general Will. But I will and declare that in any case the
158 provisions of said Special Will and Codicils as they now stand, giving effect to the Codicils in their order, shall take effect absolutely, and wholly unaffected and uncontrolled by anything contained in my said general Will or the Codicils thereto unless it be as to the appointment of Executors by my general Will. But I declare that I, of course, did not and do not intend to constitute or appoint either the said Robert Gillespie or Alexander Gillespie to be an Executor of my said general Will.

In testimony whereof I have hereto set my hand and seal at the City of New York on the twenty ninth day of May, eighteen hundred and sixty nine. WM. B. ASTOR [L. S.]

On this twenty ninth day of May, eighteen hundred and sixty nine, the above named testator William B. Astor in our presence subscribed and sealed the foregoing instrument and declared the same to be a further Codicil to his annexed Special Will or testamentary disposition of his British Consols, bearing date June twenty seventh, eighteen hundred and sixty two and to serve as therein mentioned in case of need, in connection with the said annexed Special Will and the two annexed Codicils thereto, by way of further Codicil to the general Will of said testator, and thereupon we, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses.

DANIEL D. LORD,
45 *West 19th Street, New York City.*
GEORGE DE FOREST LORD,
34 *West 17th Street, New York City.*
DANIEL LORD, JR.,
45 *West 19th Street, New York City.*

159 EXHIBIT F.

Affidavit of Alfred E. Marling.

Surrogates' Court, New York County.

In the Matter of the Transfer Tax upon the Property Transferred and Appointed by the Last Will and Testament of Laura Astor Delano, Deceased.

COUNTY OF NEW YORK, *ss:*

Alfred E. Marling, being duly sworn saith:

For upwards of twenty years past I have been engaged in business in the City of New York as a real estate broker, agent and appraiser. During the latter part of such period I was, and now am, a member of the firm of Horace S. Ely & Company in said city.

During said period of twenty years I have been continuously engaged in the business of buying, selling and renting real estate, par-

ticularly real estate situated on the Island of Manhattan and in advising with respect to making of loans on such real estate, and for that purpose I have made a special study of the values of real estate of the said Island of Manhattan.

For the purpose of the assessment of the transfer tax herein, I made a special study of the values of the lands hereinafter described and found the values of the several parcels to be, in my judgment, as hereinafter stated, the various properties so valued being
160 classified with reference to certain instruments which, as I am informed, created powers of appointment which, as I am informed, were exercised by the will of Laura Astor Delano.

Said valuations have been made as of June 15, 1902, the date of Laura Astor Delano's death:

1. Property devised by Tenth Article of the Will of John Jacob Astor to William B. Astor for life, with power to appoint, and by the Fifth Article of the Will of William B. Astor devised to Laura Astor Delano, with power to appoint.

268 Sixth Avenue
270 do
272 do
274 do
276 do
61 West 17th Street, plot and building, valued by me at... $425,000
55 West 17th do do do 50,000
57 West 17th do do do 50,000
59 West 17th do lot, valued by me at..... 50,000
308 West 15th do do do 13,000
310 West 15th do do do 13,000

2. Property devised by the second clause of the Fifth Codicil of Will of William B. Astor to Laura Astor Delano for life with power to appoint.

190 Madison Ave., lot and building, valued by me at..... $150,000
15 East 34th St., do stable do 80,000

3. Property belonging to trust estate created by Fifth Clause of the Will of William B. Astor, with power to appoint.

382 Broadway, lot and building, valued by me at..... $225,000
331 W. 14th St. do do 18,000

4. Property conveyed by William B. Astor and his wife to Laura Astor Delano for life, with power of appointment, by deed dated September 30, 1848.

45 Lafayette Place, lot and building, valued by me at..... $50,000

4½. Real estate held by the Trustees of the Trust created by
161 William B. Astor for the benefit of Laura Astor Delano for life, with power to appoint by deed dated the 28th day of October, 1875.

No. 57 East 120th St., lot and building, valued by me at.... $10,000

5. Real property conveyed by William B. Astor and his wife to Laura Astor Delano for life, with power of appointment, by deed dated September 10, 1844, said lands being known as the Cozine Farm.

Block 1045.

911 Eighth Avenue, 303 West 54th Street, 913 Eighth Avenue,	Subject to lease.....	$55,000
915 Eighth Avenue, 919 do. 305 West 54th Street,	Subject to lease.....	60,000
921 Eighth Avenue, 923 do.	Subject to lease	45,000
925 do. 927 do. 302 West 55th Street,	Subject to lease.....	60,000
307 West 54th Street,	Subject to lease.....	11,000
304 West 55th Street,	do. do.	8,000
306 do.	do. do.	8,000
308 do.	do. do.	8,000
310 do.	do. do.	8,000
312 do.	do. do.	8,000
314 do.	do. do.	8,000
316 do.	do. do.	8,000
318 do.	do. do.	8,000
320 do.	do. do.	8,000
322 do.	do. do.	8,000
324 do.	do. do.	8,000
326 do.	do. do.	8,000
328 do.	do. do.	8,000
330 do.	do. do.	9,500
332 do.	do. do.	9,500
334 do.	do. do.	9,500
336 do.	do. do.	9,500
338 do.	do. do.	9,500
340 do.	do. do.	9,500
342 do.	do. do.	9,500
344 do.	do. do.	9,500
346 do.	do. do.	9,500

348 West 55th Street,	Subject to lease.....	9,500
350 do.	do. do.	9,500
352 West 55th Street,	Subject to lease	9,500
354 do.	do. do.	9,500
356 do.	do. do.	9,500
358 do.	do. do.	9,500
360 do.	do. do.	9,500
362 do.	do. do.	9,500
364 do.	do. do.	9,500
366 do.	do. do.	9,500

368	do.	do.	do.		6,500
370	do.	do.	do.		6,500
372	do.	do.	do.		6,500
321	West 54th Street,	12 vacant lots,			
323	do.	Less for gores appraised			
325	do.	at end of list	$13,200		
327	do.		7,400		
327 adj.	do.				
339–351	do.		$20,600		99,400
830	Ninth Avenue, Subject to lease.....				12,000
832	do.	do.	do.		12,000
834	do.	do.	do.		5,000
836	do.	do.	do.		5,000
838	do.	do.	do.		7,000
840	do.	do.	do.		7,000

Block 1046.

329	West 55th Street, Subject to lease.....			$8,000
331	do.	do.	do.	8,000
333	do.	do.	do.	8,000
347	do.	do.	do.	9,500
349	do.	do.	do.	9,500
351	do.	do.	do.	9,500
353	do.	do.	do.	9,500
355	do.	do.	do.	9,500
357	do.	do.	do.	9,500
359	do.	do.	do.	9,500
361	do.	do.	do.	9,500
363	do.	do.	do.	9,500
365	do.	do.	do.	9,500
842, 844, 846, 848, 850	9th Avenue plot,	do.	do.	50,000
371, 373, 375	West 55th Street, Subject to lease,			

Block 1064.

831	Ninth Avenue, Subject to lease.....			7,500
833	do.	do.	do.	7,500
835	do.	do.	do.	7,500
837	do.	do.	do.	7,500
839	do.	do.	do.	9,500
402	West 55th Street,	do.	do.	7,500
404	do.	do.	do.	8,500
406	do.	do.	do.	8,500
408	do.	do.	do.	4,500
410	do.	do.	do.	4,500
412	do.	do.	do.	6,000

414	do.	do.	do.	6,000
416	do.	do.	do.	5,500
418	do.	do.	do.	5,400
420	do.	do.	do.	5,200
430 to 432	do.	plot 6½ lots, vacant		45,500
452 West 55th Street. Subject to lease				7,000
454	do.	do.	do.	7,000
456	do.	do.	do.	7,000
828 Tenth Avenue, with old building				7,000

Block 1065.

841 Ninth Avenue, Subject to lease				9,000
843	do.	do.	do.	7,000
845	do.	do.	do.	7,000
849 } 851 }	do.	do.	do.	25,000
403 West 55th Street,	do.	do.	do.	4,000
405	do.	do.	do.	3,800
407	do.	do.	do.	6,000
409	do.	vacant lot		6,000
411	do.	do.		10,500
413	do.	do.		7,650
415	do.	do.		7,650
417	do.	do.		7,500
419	do.	do.		7,500
421	do.	do.		7,500
421A	do.	do.		500
423 West 55th Street,	Vacant lot			7,000
423A	do.	do.		525
425	do.	do.		7,000
425A	do.	do.		550
427	do.	do.		7,000
427A	do.	do.		575
429	do.	do.		7,000

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431 West 55th Street,	Vacant lot			7,000
433	do.	do.		7,000
435	do.	do.		7,000
437	do.	do.		7,000
439	do.	do.		7,000
441	do.	do.		7,000
443	do.	do.		7,000
445	do.	do.		7,000
447	do.	do.		7,000
449	do.	do.		7,000
451	do.	do.		7,000
453	do.	do.		7,000
834 to 840 Tenth Avenue, with old buildings				45,000
842 to 848 Plot Tenth Ave., old buildings				30,000

434	West 56th Street,	with old buildings	7,000
436	do.	Vacant lot	7,000
438	do.	do.	7,000
440	do.	with old building	7,000
446	do.	Vacant lot	5,000
450	do.	do.	7,000

Block 1084.

831	Tenth Avenue,	Subject to lease	12,000
833	do.	do.	8,500
835	do.	do.	8,500
837	do.	do.	8,500
839	do.	do.	8,500
841	do.	do.	8,500
843	do.	do.	8,500
845	do.	do.	8,500
847	do.	do.	8,500
849	do.	do.	11,250
503	West 55th Street,	Subject to lease	5,000
505–507	do.	do.	12,000
509	do.	do.	6,000
511	do.	do.	6,000
513	do.	do.	6,000
515	do.	with old building	5,000
517	do.	do.	5,000
519	do.	Subject to lease	5,000
521 523 525	West 55th Street, do. do.	3 vacant lots	15,000
527 529 531	do. do. do.	Subject to lease	15,000

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533 535	West 55th Street, do.	Subject to lease	9,000
537 539	do. do.	do. do.	9,000
541	do.	Vacant	4,500
543	do.	do.	4,500
792 794 796 798	Eleventh Ave. plot, about 3½ vacant lots		22,000
800	Eleventh Avenue,	Subject to lease	6,250
802 & 804	do.	do. do.	14,000

545 West 55th Street, 547 do. 549 do. 551 do.	Subject to lease	35,000
546 West 56th Street, 548 do. 550 do.		
544 do.	vacant	4,500
542 do.	do.	4,500
540 do.	do.	4,500
538 do.	Subject to lease	4,500
536 do.	do. do.	4,500
534 do.	do. do.	4,500
532 West 56th Street,	vacant	4,500
530 do.	do.	4,500
528 do.	Subject to lease	5,000
526 do.	vacant	5,000
524 do.	do.	5,000
522 do.	do.	5,000
520 do.	do.	5,000
518 West 56th Street,	vacant	5,000
516 do.	do.	5,000
514 do.	do.	5,000
512 do.	Subject to lease	6,000
510 do.	do. do.	6,000
508 do.	vacant	6,000
506 do.	do.	6,000
504 do.	Subject to lease	6,500
502 do.	do. do.	5,000

Block 1085.

806 Eleventh Ave., with gore, Subject to lease	9,000

Block 1103.

793 Eleventh Ave., with gore, vacant	10,000
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795 Eleventh Ave., Subject to lease	6,000
797 Eleventh Ave., 799 do., 801 do., 602 & 602A West 56th St., Subject to lease	22,500
604, 604A West 56th Street, Vacant	3,000
606, 606A do. do.	3,000
608 do.	
610 do. with Gore irregular, Vacant	1,200

Block 1104.

Northwest corner 56th St. and Eleventh Ave., Vacant	14,000

6. Parcels of land of irregular shape known as the Cozine Gores, and immediately adjoining certain lots of the Cozine Farm, being real property devised by the Fourth Clause of the Third Codicil of the Will of William B. Astor.

Property at the southwest corner of Tenth Avenue and 56th Street, described in the deed from Livingston Livingston, Referee, to William B. Astor, dated Oct. 27th, 1864, and recorded in New York County in Liber 921 of Conveyances, at page 183, valued by me at..... $750

Property on the northerly side of West 54th Street, distant 425 feet eastwardly from Ninth Avenue, described in a deed from Jonas Sparks and wife to William B. Astor, dated May 22, 1863, and recorded in New York County in Liber 876 of Conveyances, at page 392, valued by me at 7,400

Property on the northerly side of West 54th Street, commencing 350 feet eastwardly from Ninth Avenue, described in a deed from Peter B. Amory and wife to William B. Astor, dated April 15, 1863, and recorded in New York County in Liber 876 of Conveyances, at page 390, valued by me at..... 13,200

ALFRED E. MARLING.

Sworn to before me this 3rd day of December, 1903.

ELI G. PARTRIDGE,
Notary Public, New York County.

167. EXHIBIT G.

(Same as Exhibit F, *supra.*)

Notice of Appeal to Court of Appeals.

Surrogates' Court, New York County.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

GENTLEMEN: Please take notice that John Hubert de Stuers, Margaret de Stuers Oberndorff (formerly Margaret de Stuers), Hubert de Stuers, John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, and the Union Trust Company as Trustee for the said John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, and their children,

Arthur Astor Carey, and the infants, Laura Astor Chanler,
168 Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman, by Egerton L. Winthrop, Jr., their special guardian; the infants Elizabeth Winthrop Emmet, Mary Chanler Emmet, Christopher Temple Emmet, Junior, and Hester Alida Emmet, by Grenville T. Emmet, their special guardian; the infants Dorothy Chanler, Lewis Stuyvesant Chanler, Junior, Alida Chanler and William Astor Chanler, Second, by Bronson Winthrop, their special guardian, persons interested in the property appointed by Laura A. Delano, in her last Will and Testament, under and by virtue of certain powers of appointment, created as follows:

(1.) A power of appointment created by William B. Astor, by deed dated September 30, 1848;

(2.) A power of appointment created by William B. Astor, by deed dated September 10, 1844;

(3.) A power of appointment created by William B. Astor, by deed dated October 28, 1865;

(4.) A power of appointment created by William B. Astor, by deed dated September 6, 1849;

hereby appeal to the Court of Appeals of the State of New York from an order of the Supreme Court, Appellate Division, First Department, entered herein and filed in the office of the Surrogates' Court of New York County on the 24th day of June, 1905, affirming an order of Honorable Frank T. Fitzgerald, one of the Surrogates of said County, made and entered herein March 22, 1905, which said order of March 22, 1905, affirmed an order theretofore made and entered herein December 11, 1903, fixing the tax upon the estate of the said decedent, under the act relating to taxable transfers, upon the following grounds to wit:

169 (1.) That Chapter 284 of the Laws of 1897, does not apply to the property so appointed to these appellants for the reason that said property was acquired by them under deeds made in the years 1844, 1848, 1849 and 1865.

(2.) That Article X of Chapter 908, Laws of 1896, and the amendments thereto, as applied to the rights and interest of the appellants herein, is unconstitutional and void, and that it is repugnant to Section 10, Article II of the Constitution of the United States, in that it impairs the obligation of contracts between William B. Astor and the appellants herein.

(3.) That Article X of Chapter 908, Laws of 1896, and the amendments thereto, as applied to the rights and interests of the appellants, is unconstitutional and void as being repugnant to Section I of the XIV Amendment of the Constitution of the United States in that it seeks to deprive citizens of property without due process of law, and to deny to persons affected thereby the equal protection of the laws.

(4.) That such portions of the property transfered by said deeds of 1844, 1848, 1849 and 1865 as were, under the terms of any of said

deeds granted to any of the said appellants on failure of appointment by said Laura A. Delano are not subject to any tax herein.

(5.) That if the property appointed to, or in trust for, any of the appellants herein under the terms of said deeds of 1844, 1848, 1849 and 1865, is held to be subject to a tax herein, such tax should be fixed with respect to the relationship of the appellants
170 herein to William B. Astor and not with respect to their relationship to the said Laura Astor Delano.

Dated New York, July 10, 1905.

ROOSEVELT & KOBBE,
Attorneys for Arthur Astor Carey,
44 Wall Street, New York City.

MORRIS, SENTELL & MAIN
Attorneys for Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet, 16 Exchange Place, New York City.

EVARTS, TRACY & SHERMAN,
Attorneys for Thos. T. Sherman, as Committee for John Armstrong Chanler, 52 Wall Street, New York City.

HOWARD MANSFIELD,
Attorney for John Hubert de Stuers, Margaret de Stuers Oberndorff and Hubert de Stuers, 49 Wall Street, New York City.

PECKHAM, MILLER & KING,
Attorneys for The Union Trust Company, as Trustee, 80 Broadway, New York City.

EGERTON L. WINTHROP, Jr.,
Special Guardian for the Infants Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler, and Chanler Armstrong Chapman, 48 Wall Street, New York City.

171 GRENVILLE T. EMMET,
Special Guardian for the Infants Elizabeth Winthrop Emmet, Mary Chanler Emmet, Christopher Temple Emmet, Jr., and Hester Alida Emmet, 52 Wall Street, New York City.

BRONSON WINTHROP,
Special Guardian for the Infants Dorothy Chanler, Lewis Stuyvesant Chanler, Jr., Alida Chanler and William Astor Chanler, Second, 32 Liberty Street, New York City.

To James A. Donnelly, Esq., Clerk of the Surrogates' Court, New York County.

Edward H. Fallows, Esq., Attorney for Comptroller of State of New York.

Henry De Forest Baldwin, Esq., Attorney for Executors of Laura A. Delano.

172 *Order of Appellate Division Appealed from.*

At a Term of the Appellate Division of the Supreme Court in and for the First Department, held at the Appellate Division Court House, in the County of New York, on the 9th day of June, 1905.

Present: Hon. Edward Patterson, Hon. Morgan J. O'Brien, Hon. Edward W. Hatch, Hon. Frank C. Laughlin, JJ.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

An appeal having been taken by John Hubert de Stuers, Margaret de Stuers Oberndorff (formerly Margaret de Stuers), Hubert de Stuers, John Armstrong Chanler, Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, and the Union Trust Company as Trustee for the said John Armstrong Chanler, Winthrop Astor Chanler,
173 Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, and their Children, Arthur Astor Carey, and the infants, Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman, by Egerton L. Winthrop, Jr., their special guardian; the infants Elizabeth Winthrop Emmet, Mary Chanler Emmet, Christopher Temple Emmet, Junior, and Hester Alida Emmet, by Grenville T. Emmet, their special guardian; the infants Dorothy Chanler, Lewis Stuyvesant Chanler, Junior, Alida Chanler and William Astor Chanler, Second, by Bronson Winthrop, their special guardian, persons interested in the property appointed by Laura Astor Delano in her last will and testament, under and by virtue of certain powers of appointment, created as follows:

(1) A power of appointment created by William B. Astor, by deed dated September 30, 1848.

(2) A power of appointment created by William B. Astor, by deed dated September 10, 1844.

(3) A power of appointment created by William B. Astor, by deed dated October 28, 1865.

(4) A power of appointment created by William B. Astor, by deed dated September 6, 1849,

to the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department from an order of Hon. Frank T. Fitzgerald, one of the Surrogates of the County of New York, made and entered herein on the 22nd day of
174 March, 1905, affirming the order theretofore made and entered herein on the 11th day of December, 1903, fixing a tax upon the estate of the said decedent under the act relating to tax-

able transfers as to the property appointed by said decedent in her last will and testament by virtue of said powers of appointment upon the certain grounds mentioned and set forth in their notice of appeal to this Court dated March 29th, 1905,

And said appeal having come on to be heard before this Court after hearing Lucius H. Beers, Esq.; of counsel for the Appellants, and George M. Judd, Esq., of counsel for the respondent, and due deliberation having been had;

Now, on motion of Edward H. Fallows, attorney for the State Comptroller, respondent, it is

Ordered and adjudged that the order appealed from be and the same hereby is affirmed with ten dollars costs and disbursements to the said respondent against the said appellants.

Enter,

M. J. O'B., *J. S. C.*

175 *Stipulation Waiving Certification.*

Court of Appeals.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

Pursuant to Section 2567 of the Code of Civil Procedure it is hereby stipulated that the foregoing are true copies of the notice of appeal to the Court of Appeals, the order of the Appellate Division appealed from and all the papers upon which the Courts below acted in this proceeding, and the whole thereof and now on file in the office of the Clerk of the Surrogates' Court of New York County, and certification thereof by the Clerk of said Court is hereby waived.

Dated New York, July 17, 1905.

ROOSEVELT & KOBBÉ,
Att'ys for Arthur Astor Carey.
MORRIS, SENTELL & MAIN,
Att'ys for Wm. Astor Chanler & Others.
EVARTS, TRACY & SHERMAN,
Att'ys for Thos. T. Sherman, as Committee for John Armstrong Chanler.
HOWARD MANSFIELD,
Att'y for John Hubert de Stuers and Others.
176 PECKHAM, MILLER & KING,
Att'ys for Union Trust Co. as Trustee.
E. L. WINTHROP, JR.,
Special Guardian for Laura Astor Chanler and Others.
GRENVILLE T. EMMET,
Special Guardian for Elizabeth Winthrop Emmet and Others.
BRONSON WINTHROP,
Special Guardian for Dorothy Chanler and Others.
HENRY DE FOREST BALDWIN,
Att'y for Executors of Laura A. Delano.
EDWARD H. FALLOWS,
Att'y for State Comptroller.

177 *Affidavit of No Opinions.*

Court of Appeals.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

CITY AND COUNTY OF NEW YORK, *ss:*

Lucius H. Beers, being duly sworn, says that he has acted as counsel for the appellants in this proceding since its institution and is familiar therewith; that in fixing the tax herein no opinion was given by Surrogate Thomas; in affirming the order fixing the tax, no opinion was given by Surrogate Fitzgerald; in affirming the order of affirmance of the Surrogates' Court no opinion was given by any one of the Justices of the Appellate Division.

LUCIUS H. BEERS.

Sworn to before me this 17th day of July, 1905.

DARIUS E. PECK,
Commissioner of Deeds, the City of New York.

178 *Order of Surrogate's Court on Remittitur.*

At a Surrogate's Court held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 18th day of January, 1906.

Present: Hon Abner C. Thomas, Surrogate.

In the Matter of the Transfer Tax upon the Estate of LAURA ASTOR DELANO, Deceased.

An order in this proceeding having been entered in this Court on the 22nd day of March, 1905, affirming an order of the same Court entered herein on the 11th day of December, 1903, assessing a transfer tax upon the transfer of property passing by virtue of the exercise by said decedent of certain powers of appointment;

And an appeal having been taken to the Appellate Division on the 29th day of March, 1905, and an order having been duly entered in the office of the clerk of said Court on the 9th day of June, 1905, affirming the order of the Surrogates Court appealed from;

179 And an appeal having been taken from said last mentioned order by the Appellants herein to the Court of Appeals on the 10th day of July, 1905, and said order of the Appellate Division having been affirmed, and a remittitur having been sent down from said Court and filed in this Court on the 14th day of December, 1905;

Now, on reading the said remittitur from the Court of Appeals and

on motion of Edward H. Fallows, attorney for the State Comptroller, respondent herein, it is

Ordered and adjudged that the order and judgment of the said Court of Appeals be, and the same is hereby made the order and judgment of this Court, and it is

Further ordered and adjudged that the respondent herein recover from the Appellants herein the sum of One hundred eighty-four and 35/100 Dollars, the amount of his costs and disbursements as taxed in this proceeding and that said respondent have execution therefor.

ABNER C. THOMAS, *Surrogate.*

180 [Endorsed:] Surrogate's Court, New York County. In the matter of the transfer tax upon the estate of Laura Astor Delano, deceased. Copy. Order. Edward H. Fallows, Attorney for State Comptroller, Office and P. O. Address, 170 Broadway, Manhattan, New York City.

181 Surrogate's Court of the State of New York, New York County.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

Assignment of Errors.

And now come the plaintiffs in error Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler and Alida Beekman Emmet, by Morris, Sentell & Main, their attorneys and counsel, and the plaintiff in error Thomas T. Sherman as Committee for John Armstrong Chanler, by his attorneys and counsel, Evarts, Tracy & Sherman, and they respectfully report that they feel themselves aggrieved by the proceedings, order and decree of the Court of Appeals of the State of New York and of the Surrogate's Court of the County of New in the above entitled cause made upon a remittitur from said Court of Appeals of the State of New York, which is the highest court of law and equity
182 of the said state in which a decision could be had and they assign error thereto as follows, that is to say:

First. That the Court erred in holding that the estates in remainder created by the deed made by William B. Astor and dated September 10, 1844, were subject to taxation under Chapter 284 of the Laws of 1897 of the State of New York, by reason of the exercise of the power of appointment given by said deed to Laura Astor Delano, and erred in refusing to hold that the right to exercise such power of appointment was derived from the said deed of September 10, 1844, and not from a privilege given by the State of New York to the said Laura Astor Delano, and further erred in refusing to hold that the said statute, Chapter 284 of the Laws of 1897, as so construed by said Court, and by the highest Court of the State of New York, is unconstitutional and void, as being repugnant to Section 10

of Article I of the Constitution of the United States, in that it impairs the obligation of a contract between the said William B. Astor and these plaintiffs in error which contract was made prior to the passage and enactment of said statute.

Second. That the Court erred in holding that the estates in remainder created by the deed made by William B. Astor and dated September 10, 1844, were subject to taxation under the provisions of Chapter 284 of the Laws of 1897 of the State of New York,
183 and erred in refusing to hold that said estates in remainder were not subject to taxation under said Act because no owner of said estates in remainder had died since such estates in remainder were created by said deed of September 10, 1844, and in refusing to hold that the said Act (Chapter 284 of the Laws of 1897) as so construed by said Court and by the highest Court of the State of New York is unconstitutional and void, as being repugnant to Section I of the 14th Amendment to the Constitution of the United States, in that it deprives these plaintiffs in error of their property without due process of law and denies to them the equal protection of the laws.

Third. That the Court erred in holding that the estates in remainder created by the deed made by William B. Astor and dated September 10, 1844, were subject to taxation under Chapter 284 of the Laws of 1897 of the State of New York, and erred in refusing to hold that the appointment of said estates in remainder made by the said Laura Astor Delano was not a succession caused by the death of the owner of such estates in remainder, and that said Court further erred in refusing to hold that said Chapter 284 of the Laws of 1897 as construed by said Court and by the highest Court of the State of New York is unconstitutional and void, in that, as so construed by said Courts, it imposes a tax on the estates in re-
184 mainder owned by these plaintiffs in error by providing that the appointment of said estates in remainder by the said Laura Astor Delano "shall be deemed" a succession caused by the death of the owner of said estates in remainder, when the said estates in remainder were not in fact owned by the said Laura Astor Delano, and she did not in fact die seized of such estates, and in refusing to hold that the said statute Chapter 284 of the Laws of 1897 of the State of New York, as so construed and interposed by said Court, and by the highest Court of the State of New York, is unconstitutional and void, as being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives these plaintiffs in error of their property without due process of law.

Fourth. That the Court erred in holding that the estates in remainder created by the deed made by William B. Astor and dated September 10, 1844, were subject to taxation under Chapter 284 of the Laws of 1897 of the State of New York, and erred in refusing to hold that the appointment of said estates in remainder made by the said Laura Astor Delano was not a succession caused by the death of the owner of such estates in remainder, and that said Court further erred in refusing to hold that said Chapter 284 of the Laws of 1897

as construed by said Court and by the highest Court of the
185 State of New York, is unconstitutional and void, in that as so construed by said Courts, it imposes a tax on the estates in remainder owned by these plaintiffs in error by providing that the appointment of said estates in remainder by the said Laura Astor Delano shall be deemed a succession caused by the death of the owner of said estates in remainder "as though" said estates in remainder had "belonged absolutely" to the said Laura Astor Delano when said estates in remainder did not in fact belong to her and she did not die seized of them, and in refusing to hold that the said statute (Chapter 284 of the Laws of 1897 of the State of New York) as so construed and interpreted by said Courts and by the highest Court of the State of New York, is unconstitutional and void, as being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives these plaintiffs in error of their property without due process of law.

Fifth. That the Court erred in holding that such aliquot part of the estates in remainder transferred by the deed made by William B. Astor and dated September 10, 1844, as were, under the terms of said deed, granted to these plaintiffs in error on failure of appointment by the said Laura Astor Delano, were subject to taxation under Chapter 284 of the Laws of 1897 of the State of New York, and erred in refusing to hold that such aliquot parts of said estates in remainder were not subject to taxation under said Act because title to
186 such aliquot parts was vested in these plaintiffs in error prior to the passage and enactment of said Chapter 284 of the Laws of 1897 of the State of New York, and was also vested in them without resort to the appointment made by the said Laura Astor Delano, and erred in refusing to hold that the said statute (Chapter 284 of the Laws of 1897) as construed by said Court and by the highest Court of the State of New York, is unconstitutional and void, as being repugnant to Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of a contract between William B. Astor and these plaintiffs in error which contract was made prior to the passage and enactment of said statute, and erred in refusing to hold that said act as so construed by said Courts, is further unconstitutional and void, as being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives these plaintiffs in error of their property without due process of law.

And now comes the plaintiff in error Arthur Astor Carey by Roosevelt & Kobbe, his attorneys and counsel and respectfully reports that he feels himself aggrieved by the proceedings, order and decree of the Surrogates' Court of the County of New York in the above entitled cause made upon the remittitur of the Court of Appeals of the State of New York, which is the highest Court of
187 law and equity of the said State in which a decision could be had and assigns error thereto as follows, that is to say:

First. That the Court erred in holding that the estates in remainder created by the deeds made by William B. Astor and dated September 30, 1848 and September 6, 1849, respectively, were subject to

taxation under Chapter 284 of the Laws of 1897 of the State of New York, by reason of the exercise of the powers of appointment given by said deeds to Laura Astor Delano, and erred in refusing to hold that the right to exercise such powers of appointment was derived from the said deeds of September 30, 1848, and September 6, 1849, and not from a privilege given by the State of New York to the said Laura Astor Delano, and further erred in refusing to hold that the said statute, Chapter 284 of the Laws of 1897, as so construed by said Court, and by the highest Court of the State of New York, is unconstitutional and void, as being repugnant to Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of contracts between the said William B. Astor and this plaintiff in error which contracts were made prior to the passage nad enactment of said statute.

Second. That the Court erred in holding that the estates in remainder created by the deeds made by William B. Astor and
188 dated September 30, 1848, and September 6, 1849, respectively, were subject to taxation under the provisions of Chapter 284 of the Laws of 1897 of the State of New York, and erred in refusing to hold that said estates in remainder were not subject to taxation under said Act because no owner of said estates in remainder had died since such estates in remainder were created by said deeds of September 30, 1848, and September 6, 1849, and in refusing to hold that the said Act (Chapter 284 of the Laws of 1897), as so construed by said Court and by the highest Court of the State of New York is unconstitutional and void, as being repugnant to Section 7 of the 14th Amendment to the Constitution of the United States, in that it deprives this plaintiff in error of his property without due process of law and denies to him the equal protection of the laws.

Third. That the Court erred in holding that the estates in remainder created by the deeds made by William B. Astor and dated September 30, 1848, and September 6, 1849, respectively, were subject to taxation under Chapter 284 of the Laws of 1897 of the State of New York, and erred in refusing to hold that the appointment of said estates in remainder made by the said Laura Astor Delano was not a succession caused by the death of the owner of such estates in remainder, and that said Court further erred in refusing to
189 hold that said Chapter 284 of the Laws of 1897 as construed by said Court and by the highest Court of the State of New York is unconstitutional and void, in that, as so construed by said Court, it imposes a tax on the estates in remainder owned by this plaintiff in error by providing that the appointment of said estates in remainder by the said Laura Astor Delano "shall be deemed" a succession caused by the death of the owner of said estates in remainder, when the said estates in remainder were not in fact owned by the said Laura Astor Delano, and she did not in fact die seized of such estates, and in refusing to hold that the said statute Chapter 284 of the Laws of 1897 of the State of New York, as so construed and interpreted by said Court, and by the highest Court of the State of New York, is unconstitutional and void, as being repugnant to Section 1 of the 14th Amendment of the Constitution of the United

States, in that it deprives this plaintiff in error of his property without due process of law.

Fourth. That the Court erred in holding that the estates in remainder created by the deeds made by William B. Astor and dated September 30, 1848, and September 6, 1849, respectively, were subject to taxation under Chapter 284 of the Laws of 1897 of the State of New York, and erred in refusing to hold that the appointment of said estates in remainder made by the said Laura Astor
190 Delano was not a succession caused by the death of the owner of such estates in remainder, and that said Court further erred in refusing to hold that said Chapter 284 of the Laws of 1897 as construed by said Court and by the highest Court of the State of New York, is unconstitutional and void, in that, as so construed by said Court, it imposes a tax on the estates in remainder owned by this plaintiff in error by providing that the appointment of said estates in remainder by the said Laura Astor Delano shall be deemed a succession caused by the death of the owner of said estates in remainder "as though" said estates in remainder had "belonged absolutely" to the said Laura Astor Delano when said estates in remainder did not in fact belong to her and she did not die seized of them, and in refusing to hold that the said statute (Chapter 284 of the Laws of 1897 of the State of New York) as so construed and interpreted by said Court and by the highest Court of the State of New York, is unconstitutional and void, as being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives this plaintiff in error of his property without due process of law.

Fifth. That the Court erred in holding that such aliquot part of the estates in remainder transferred by the deeds made by William B. Astor and dated September 30, 1848, and September 6, 1849, as were, under the terms of said deed, granted to this plaintiff in
191 error on failure of appointment by the said Laura Astor Delano, were subject to taxation under Chapter 284 of the Laws of 1897 of the State of New York, and erred in refusing to hold that such aliquot parts of said estates in remainder were not subject to taxation under said Act because title to such aliquot parts was vested in this plaintiff in error prior to the passage and enactment of said Chapter 284 of the Laws of 1897 of the State of New York, and was also vested in him without resort to the appointment made by the said Laura Astor Delano, and erred in refusing to hold that the said statute (Chapter 284 of the Laws of 1897) as construed by said Court and by the highest Court of the State of New York, is unconstitutional and void, as being repugnant to Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of contracts between William B. Astor and this plaintiff in error which contracts were made prior to the passage and enactment of said statute, and erred in refusing to hold that said act as so construed by said Courts, is further unconstitutional and void, as being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives this plainiff in error of his property without due process of law.

192 And now come the plaintiffs in error John Hubert de Stuers, Margaret de Stuers Oberndorff and Hubert de Stuers, by Howard Mansfield, their attorney and counsel, and the plaintiffs in error Winthrop Astor Chanler and Elizabeth Winthrop Chapman, by Morris, Sentell & Main, their attorneys and counsel, and the plaintiff in error Thomas T. Sherman, as Committee for John Armstrong Chanler, by Evarts, Tracy & Sherman, his attorneys and counsel, and the plaintiffs in error the infants Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman, by Egerton L. Winthrop, Jr., their special guardian, and said plaintiffs in error respectfully report that they feel aggrieved by the proceedings, order and decree of the Surrogates' Court of the County of New York in the above entitled cause, which is made upon a remittitur from the Court of Appeals of the State of New York, which is the highest Court of law and equity of said State, in which a decision could be had and assign error thereto as follows, that is to say:

First. That the Court erred in holding that the estates in remainder created by the deed made by William B. Astor and dated October 28, 1865, were subject to taxation under Chapter 284 of the Laws of 1897 of the State of New York, by reason of the
193 exercise of the power of appointment given by said deed to Laura Astor Delano, and erred in refusing to hold that the right to exercise such power of appointment was derived from the said deed of October 28, 1865, and not from a privilege given by the State of New York to the said Laura Astor Delano, and further erred in refusing to hold that the said statute, Chapter 284 of the Laws of 1897, as so construed by said Court, and by the highest Court of the State of New York, is unconstitutional and void, as being repugnant to Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of a contract between the said William B. Astor and these plaintiffs in error which contract was made prior to the passage and enactment of said statute.

Second. That the Court erred in holding that the estates in remainder created by the deed made by William B. Astor and dated October 28, 1865, were subject to taxation under the provisions of Chapter 284 of the Laws of 1897 of the State of New York, and erred in refusing to hold that said estates in remainder were not subject to taxation under said Act because no owner of said estates in remainder had died since such estates in remainder were created by said deed of October 28, 1865, and in refusing to hold that the said Act (Chapter 284 of the Laws of 1897) as so construed
194 by said Court and by the highest Court of the State of New York is unconstitutional and void, as being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives these plaintiffs in error of their property without due process of law and denies to them the equal protection of the laws.

Third. That the Court erred in holding that the estates in remainder created by the deed made by William B. Astor and dated October 28, 1865, were subject to taxation under Chapter 284 of the Laws of 1897 of the State of New York, and erred in refusing to hold that the appointment of said estates in remainder made by the said Laura Astor Delano was not a succession caused by the death of the owner of such estates in remainder, and that said Court further erred in refusing to hold that said Chapter 284 of the Laws of 1897 as construed by said Court and by the highest Court of the State of New York is unconstitutional and void, in that, as so construed by said Courts, it imposes a tax on the estates in remainder owned by these plaintiffs in error by providing that the appointment of said estates in remainder by the said Laura Astor Delano "shall be deemed" a succession caused by the death of the owner of said estates in remainder, when the said estates in remainder were not in fact owned by the said Laura Astor Delano, and she did not in fact die seized of such estates, and in refusing
195 to hold that the said statute 284 of the Laws of 1897 of the State of New York, as so construed and interpreted by said Courts, is unconstitutional and void, as being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives these plaintiffs in error of their property without due process of law.

Fourth. That the Court erred in holding that the estates in remainder created by the deed made by William B. Astor and dated October 28, 1865, were subject to taxation under Chapter 284 of the Laws of 1897 of the State of New York, and erred in refusing to hold that the appointment of said estates in remainder made by the said Laura Astor Delano was not a succession caused by the death of the owner of such estates in remainder, and that said Court further erred in refusing to hold that said Chapter 284 of the Laws of 1897 as construed by said Court and by the highest Court of the State of New York, is unconstitutional and void, in that, as so construed by said Courts, it imposes a tax on the estates in remainder owned by these plaintiffs in error by providing that the appointment of said estates in remainder by the said Laura Astor Delano shall be deemed a succession caused by the death of the owner of said estates in remainder "as though" said estates in remainder had "belonged absolutely" to the said Laura Astor
196 Delano when said estates in remainder did not in fact belong to her and she did not die seized of them, and in refusing to hold that the said Statute (Chapter 284 of the Laws of 1897 of the State of New York) as so construed and interpreted by said Court and by the highest Court of the State of New York, is unconstitutional and void, as being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives these plaintiffs in error of their property without due process of law.

Wherefore the said plaintiffs in error Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop

Chanler, Alida Beekman Emmet, Thomas T. Sherman, as Committee for John Armstrong Chanler, Arthur Astor Carey, John Hubert de Stuers, Margaret de Stuers Oberndorff and Hubert de Stuers, and the infants Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman, by their special guardian Egerton L. Winthrop, Jr., pray that the United States Supreme Court examine and correct the errors assigned for the reversal of the judgment and decision herein of the Court of Appeals of the
197 State of New York, and the judgment and decree rendered by the Surrogates' Court of the County and State of New York on the remittitur of the said Court of Appeals of the said State of New York and dismiss said proceeding.

Dated, March 15, 1906.

MORRIS, SENTELL & MAIN,
Attorneys for Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet.

EVARTS, TRACY & SHERMAN,
Attorneys for Thomas T. Sherman, as Committee for John Armstrong Chanler.

ROOSEVELT & KOBBE,
Attorneys for Arthur Astor Carey.

HOWARD MANSFIELD,
Attorney for John Hubert de Stuers, Margaret de Stuers Oberndorff, and Hubert de Stuers.

EGERTON L. WINTHROP, JR.,
Special Guardian for Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler, and Chanler Armstrong Chapman.

LUCIUS H. BEERS,
LUCIUS H. BEERS,
Of Counsel.

198 [Endorsed:] Surrogates' Court of the State of New York, New York County. In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the Property of Laura Astor Delano, deceased. Assignment of Errors. Lucius H. Beers, Counsel for plaintiffs in error, 49 Wall Street, New York City. Filed March 22, 1906.

199 *Petition for Writ of Error.*

UNITED STATES OF AMERICA, *State of New York:*

To the Hon. Rufus W. Peckham, Associate Justice of the Supreme Court of the United States:

And now come your petitioners Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, and Alida Beekman Emmet, by Morris, Sentell & Main, their attorneys and counsel; Thomas T. Sherman, as Committee for John Armstrong Chanler, by his attorneys and counsel, Evarts, Tracy & Sherman; Arthur Astor Carey, by Roosevelt & Kobbe, his attorneys and counsel; and John Hubert de Stuers, Margaret de Stuers Oberndorff and Hubert de Stuers, by Howard Mansfield, their attorney and counsel; and Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman, by Egerton L. Winthrop, their special guardian, and show that in the record and proceedings had in the Court of Appeals of the State of New York, in the
200 proceeding entitled "In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the Property of Laura Astor Delano, deceased," and in the rendition of a judgment and order by said Court of Appeals and in the rendition of a judgment and order by the Surrogates' Court of the County and State of New York, upon a remittitur from the said Court of Appeals of the State of New York, making the judgment and order of said Court of Appeals the judgment and order of said Surrogates' Court, manifest error hath happened to the great damage of your petitioners.

The record and proceedings of said proceeding is now in the said Surrogates' Court of the County of New York, in the State of New York, on the said remittitur from the said Court of Appeals of the State of New York.

Said Court of Appeals is the highest court of law and equity in the said State in which a decision could be had in said proceeding.

By said remittitur said Court of Appeals remitted to the Surrogates' Court of the County of New York the records and proceedings had in said Court in said proceeding to be proceeded upon by said Surrogates' Court, according to law, with an order affirming an order and decree theretofore rendered in the Appellate Divis-
201 ion of the Supreme Court of the State of New York on the 24th day of June, 1905, affirming an order of said Surrogates' Court made and entered March 22, 1905, which said order of March 22, 1905, affirmed an order made and entered in said Surrogates' Court on December 11, 1903, in favor of Otto Kelsey, Comptroller of the State of New York, and against your petitioners. Upon said direction and order of the Court of Appeals a decree of affirmance was entered in said Surrogates' Court of the County of New

York on the 18th day of January, 1906, making the judgment and order of the Court of Appeals the judgment and order of said Surrogates' Court, with costs.

By said judgment and order there was drawn in question the validity of a statute of the State of New York and of an authority exercised thereunder on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity, and therein titles, rights, privileges and immunities were claimed under the Constitution of the United States and the decision was against the titles, rights privileges and immunities so set up and claimed, all of which appears in the record and
202 proceedings in said proceeding, which is submitted herewith.

Your petitioners claim the right to remove said judgment and order to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States.

Wherefore your petitioners, the said Winthrop Astor Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, Thomas T. Sherman, as Committee for John Armstrong Chanler, Arthur Astor Carey, John Hubert de Stuers, Margaret de Stuers Oberndorff and Hubert de Stuers, and the infants Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, Theodore Ward Chanler and Chanler Armstrong Chapman, by their special guardian, pray for the reversal of said judgment and order of the Court of Appeals and of the said judgment and order of the Surrogates' Court and for the allowance of a writ of error and such other proceedings as may cause the said judgment and order to be corrected by the Supreme Court of the United States.

Dated March 16, 1906.

MORRIS, SENTELL & MAIN,
Attorneys for Winthrop Astor Chanler and Others.

203 EVARTS, TRACY & SHERMAN,
Attorneys for Thos. T. Sherman, as Committee for J. A. Chanler.

ROOSEVELT & KOBBE,
Attorneys for Arthur Astor Carey.

HOWARD MANSFIELD,
Attorneys for J. H. de Stuers and Others.

EGERTON L. WINTHROP,
Special Guardian for Laura A. Chanler and Others,
Attorney, in Person.

LUCIUS H. BEERS,
Of Counsel.

Let the Writ of Error issue as prayed and the bond for that purpose is fixed at the sum of $1,000.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

M'ch 16, 1906.

204 [Endorsed:] U. S. Supreme Court. Winthrop Astor Chanler and others, Plaintiffs in Error, against Otto Kelsey, State Comptroller, Defendant in Error. Petition for Writ of Error. Lucius H. Beers, Counsel for Plaintiffs in Error, 49 Wall Street, New York. Filed March 22, 1906.

205 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Surrogates of the Surrogates' Court of the County of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Surrogates' Court of the County of New York, State of New York, before you, or some of you, upon a remittitur from the Court of Appeals of the State of New York, being the highest court of law or equity of the said State in which a decision could be had in the said proceeding entitled "In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the Property of Laura Astor Delano, deceased," wherein was drawn in question the validity of a statute and of an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity; and wherein
206 was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, and exemption specially set up and claimed under such clause of the said Constitution; a manifest error hath happened to the great damage of the said Winthrop Astor Chanler, Thomas T. Sherman, as Committee for John Armstrong Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, Arthur Astor Carey, John Hubert de Stuers, Margaret de Stuers Oberndorff, Hubert de Stuers, Chanler Armstrong Chapman, Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, and Theodore Ward Chanler as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Su-
207 preme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16 day of March, in the year of *of* our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

208 [Endorsed:] United State- Supreme Court. Winthrop Astor Chanler, and others, Plaintiffs in Error, against Otto Kelsey, Defendant in Error. Writ of Error. Lucius H. Beers, Counsel for Plaintiffs in Error, 49 Wall Street, New York. Filed March 22, 1906.

209 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Otto Kelsey, Comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Surrogates' Court of the County of New York, State of New York, wherein Winthrop Astor Chanler, Thomas T. Sherman as Committee for John Armstrong Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, Arthur Astor Carey, John Hubert de Stuers, Margaret de Stuers Oberndorff, Hubert de Stuers, Chanler Armstrong Chapman, Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler and Theodore Ward Chanler, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, Associate
210 Justice of the Supreme Court of the United States, this 16th day of March, in the year of our Lord one thousand nine hundred and six.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Service of citation admitted.
N. Y. Mch. 21st 1906.

EDWARD H. FALLOWS,
Attorney for Comptroller of the State of New York.

211 [Endorsed:] United States Supreme Court. Winthrop Astor Chanler, and others, Plaintiffs in Error, against Otto Kelsey, Defendant in Error. Citation. Lucius H. Beers, Counsel for Plaintiffs in Error, 49 Wall Street, New York. Filed March 22, 1906.

212 *Bond on Writ of Error.*

Know all men by these presents: That the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland duly authorized to transact the business of indemnity and suretyship, and having an office and principal place of business for the State of New York at No. 35 Wall Street, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto Otto Kelsey, State Comptroller of the State of New York, in the full and just sum of One Thousand Dollars ($1000.00), to be paid to the said Otto Kelsey, State Comptroller, his successors and assigns, to which payment, well and truly to be made, the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal. Dated this twenty-fourth day of February, in the year of our Lord One thousand nine hundred and six.

Whereas, lately at a Surrogate's Court in the County and State of New York in a proceeding pending in said Court entitled: "In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the Property of Laura Astor Delano, deceased" a judgment and decree was rendered on a remittitur from the Court of Appeals of said State, and Winthrop Astor Chanler, Thomas T. Sherman as Committee for John Armstrong Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, Arthur Astor Carey, John Hubert de Stuers, Margaret de Stuers Oberndorff, Hubert de Stuers, Chanler Armstrong Chapman, Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler and Theodore Ward Chanler, having obtained a writ of error and filed a copy thereof in the Clerk's Office of said Court, to reverse the judgment in
213 the aforesaid proceeding, and a citation directed to the said Otto Kelsey, State Comptroller, citing and admonishing him to be and appear at a Supreme Court of the United States at Washington, within thirty (30) days from the date thereof;

Now, the condition of the above obligation is such, that if the said Winthrop Astor Chanler, Thomas T. Sherman, as Committee for John Armstrong Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, Arthur Astor Carey, John Hubert de Stuers, Margaret de Stuers Oberndorff, Hubert de Stuers, Chanler Armstrong Chapman, Laura Astor Chanler, Beatrice Margaret Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop

Chanler, and Theodore Ward Chanler shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By HUGH M. ALLWOOD, *Attorney-in-fact.*

Attest:
[SEAL.] JAMES R. KINGSLEY, *Attorney-in-fact.*

214 STATE OF NEW YORK, *County of New York, ss:*

On the twenty-fourth day of February, in the year 1906, before me personally came James R. Kingsley, to me known, who, being by me duly sworn, did depose and say, that he resided in the City of New York; that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 3, of Chapter 720, of the Session Laws of the State of New York, for the year 1893. And the said James R. Kingsley further said that he was acquainted with Hugh M. Allwood, and knew him to be the Attorney-in-Fact of said Company; that the signature of the said Hugh M. Allwood, subscribed to the within instrument, was in the genuine handwriting of the said Hugh M. Allwood, and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said James R. Kingsley.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

At a regular and lawful meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the Company, in the City of Baltimore, State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously

"*Resolved*, That in pursuance of Section eight hundred and eleven "of the Code of Civil Procedure of the State of New York, Henry B. "Platt, Vice-President, or George Sewell Bonner, Attorney, or Frank "H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood "and James R. Kingsley, Attorneys-in-Fact of this Company, in the "State of New York, be, and each of them is, hereby authorized and "empowered to sign, execute and deliver any and all bonds or under-"takings for or on behalf of this Company, and to attach thereto the "seal of the corporation, the same to be attested by the said George "Sewell Bonner, Attorney of the Company, or by either one of the "other persons above named, as occasion may require."

County of New York, ss:

I, James R. Kingsley, Attorney-in-fact of the Fidelity and Deposit Company, of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 24th day of February, 1906.

[SEAL.] JAMES R. KINGSLEY,
Attorney-in-Fact.

Fidelity and Deposit Company of Maryland.

Statement, December 30th, 1905.

Resources.		Liabilities.	
Real Estate.....	$757,000 00	Capital Stock.....	$2,000,000 00
Stocks and Bonds.	3,451,925 00	Surplus and Undivided Profits..	2,726,700 56
Railroad Bonds...	1,231,250 00	Premium Reserve Requirement.	718,091 62
British Consols....	239,500 00	Reserve for Contingent Claims..	664,787 60
Net Premiums Due	102,875 62	Claims Adjusted (Checks out)..	5,015 48
Cash in Bank, etc.	367,943 19	Claims in Process of Adjustment	35,898 55
	$6,150,493 81		$6,150,493 81

STATE OF NEW YORK, *County of New York, ss:*

James R. Kingsley, being duly sworn, says that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said Company, as of December 30th, 1905, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 24th day of February, 1906.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

215 [Endorsed:] United States Supreme Court. Winthrop Astor Chanler and others, Plaintiffs in Error, *vs.* Otto Kelsey, Defendant in Error. Copy. Bond. Approved by R. W. Peckham, Associate Justice of the Supreme Court of the United States. Not to operate as a supersedeas. M'ch 16, 1906. Fidelity and Deposit Company of Maryland, 35 Wall Street, New York.

216 *Certification.*

STATE OF NEW YORK, *County of New York, ss:*

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of New York County, do hereby certify that the foregoing record of Papers on Appeal to the Court of Appeals of the State of New York, and the remittitur issued by and from said Court of Appeals all in the proceeding entitled "In the Matter of the Appraisal under the Act in relation to Taxable Transfers of Property of the Property of Laura Astor Delano, Deceased," are the originals thereof filed in the Office of this Court and that I have compared the copy of the order of the Surrogates' Court made upon and pursuant to said remittitur, thereto attached with the original thereof filed in the Office of this Court, and have found the same is a true and correct copy of such original; that attached to said papers are the assignment of errors, the petition for a writ of error with allowance thereof and the amount of security fixed thereon, the writ of error with allowance thereon, the citation with acceptance of service thereof, filed in the Office of this Court, and the same are the originals thereof; that I have compared the copy of the bond on writ of error, attached to said papers with the original thereof on file in the office of this Court, and find the same to be *to be* a true copy of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the Surrogates' Court of the County of New York this Twenty second day of March in the year of our Lord one thousand nine hundred and six.

[New York Surrogate's Seal.]

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

217 STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

I, W. H. Shankland, Clerk of the Court of Appeals of the said State of New York, do hereby certify that no opinion was handed down by the Court of Appeals on affirming, December 12, 1905, the order of the Appellate Division of the Supreme Court affirming the order of the Surrogate fixing the tax under the act in relation to taxable transfers of property, in the Matter of the Estate of Laura Astor Delano, deceased.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at the City of Albany, this first day of February, A. D., 1906.

[Seal State of New York, Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

218 United States Supreme Court.

In Error to the Surrogates' Court of New York County.

WINTHROP ASTOR CHANLER, THOMAS T. SHERMAN, as Committee for John Armstrong Chanler, Elizabeth Winthrop Chapman, William Astor Chanler, Lewis Stuyvesant Chanler, Margaret Livingston Chanler, Robert Winthrop Chanler, Alida Beekman Emmet, Arthur Astor Carey, John Hubert de Stuers, Margaret de Stuers Oberndorff, Hubert de Stuers, Chanler Armstrong Chapman, Laura Astor Chanler, Beatrice Margaret Mary Chanler, Hester Marion Chanler, Marion Winthrop Chanler, May Margaret Gabrielle Chanler, Hubert Winthrop Chanler, and Theodore Ward Chanler, Plaintiffs in Error,

against

OTTO KELSEY, Comptroller of the State of New York, Defendant in Error.

Surrogates' Court, New York County.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of LAURA ASTOR DELANO, Deceased.

It is hereby stipulated and agreed that the annexed certified copy of the opinion of the Court of Appeals of the State of New York in the Matter of Delano reported in 176 N. Y. page 486, and the
219 annexed certified copy of the opinion of the Appellate Division of the Supreme Court in the same case reported in 82 App. Div. page 147, be included in the record of the United States Supreme Court herein, said opinions having been given by said Court of Appeals and said Appellate Division, respectively, upon an application made by Arthur Astor Carey, one of the plaintiffs in error herein, to have this proceeding dismissed as to him. No opinion was given by the Surrogate upon such application.

March 21st, 1906.

LUCIUS H. BEERS,
Counsel for Plaintiffs in Error.
EDWARD H. FALLOWS,
Attorney for Comptroller of the State of New York.

220 STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

I, W. H. Shankland, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copy of the opinion of the Court of Appeals in the Matter &c. of the Estate of Laura Astor Delano, deceased, with the official report thereof in Volume 176 of New York Reports on file in this office,

and that the same is a correct transcript therefrom, and of the whole of said opinion.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the City of Albany, this first day of February, A. D., 1906.

[Seal State of New York, Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

221 *Opinion of Court of Appeals in Matter of Delano* (176 *N. Y.* 486.)

In the Matter of the Transfer Tax upon the Property Transferred and Appointed by the Last Will and Testament of LAURA ASTOR DELANO.

(Decided November 24, 1903.)

Appeal from an order of the Appellate Divison of the Supreme Court in the first judicial department reversing an order of the surrogate of the county of New York and dismissing the proceeding as to Arthur Astor Carey.

The facts appear in the opinion.

George M. Judd for appellant.

Lucius H. Beers for respondent.

VANN, *J.:*

This appeal presents the question whether the legislature is prohibited by the Constitution, State or Federal, from passing an act to impose a transfer tax upon the exercise, by a last will and testament, of a power of appointment derived from a deed, executed before the passage of any statute imposing a tax upon the right of succession to the property of a decedent.

The facts out of which this question arose are as follows: On the 30th of September, 1848, William B. Astor owned a house and lot on Lafayette place, in the city of New York, and on that day he conveyed the same to his daughter, Mrs. Laura Delano, for life, and upon her death, without issue, to her brothers and her sister Alida, or their issue as they might then survive, *per stirpes.*

222 By the same deed he conferred upon Mrs. Delano a power of appointment, to be exercised, in her discretion, by an instrument "in its nature testamentary," in such a manner as "to give the said land and premises, or any share or part thereof, to and amongst her said * * * brothers and sister Alida, or their issue, in such manner and proportions as she may appoint."

On the 6th day of September, 1849, said William B. Astor transferred certificates of the public debt of the state of Ohio, amounting to $50,000, to James Gallatin and another in trust to receive the income and apply it to the use of his daughter Laura during her life, and upon her death without issue to transfer "the capital of the said stock * * * to her surviving brothers and sister Alida" or their

issue then surviving. This gift was also subject to a power of appointment created by the trust deed, whereby the said Laura was authorized "by any instrument duly executed as a will of personal estate to dispose of said capital into and amongst her * * * brothers, sister and their issue in such shares and proportions as she may think fit and upon such limitations, by the way of trust or otherwise, as in her discretion may be lawfully devised."

William B. Astor died on the 24th of November, 1875, about twenty-six years after the date of the last deed and neither of said instruments was made by him in contemplation of death. Mrs. Delano, his daughter, died June 15th, 1902, without issue, leaving a last will and testament, which has been duly admitted to
223 probate, whereby she exercised the power of appointment contained in said deeds in favor of Arthur Astor Carey, her nephew.

A proceeding was commenced before the proper surrogate to make the usual appraisal for the purpose of assessing a transfer tax upon the property transferred and appointed by the last will and testament of Mrs. Delano, and Mr. Carey was notified to appear. He appeared only for the purpose of objecting to the jurisdiction of the surrogate, from whom he procured an order requiring the executors of Mrs. Delano and the comptroller of the state to show cause why the proceeding should not be dismissed as to him for want of jurisdiction. The surrogate denied the motion, but upon appeal to the Appellate Division his order was reversed and the proceeding was dismissed as to Mr. Carey. The comptroller appealed to this court.

Article 10 of the Tax Law relates to taxable transfers, and embraces sections 220 to 242 inclusive. Section 220, as amended in 1897, imposes a tax upon the transfer of any property, real or personal, not only by will or intestate law, but also "whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates be-
224 longed absolutely to the donee of such power, and had been bequeathed or devised by such donee by will; * * * ." (L. 1897, ch. 284, §220, subd. 5.)

The learned Appellate Division held that the statute, as amended, applied to the property in question, but that the appointee took under the deeds and not under the will, and the attempt of the act to impose a tax upon the property under the guise of a tax upon succession, was retroactive and unconstitutional.

The statute, as we read it, does not attempt to impose a tax upon property, but upon the exercise of a power of appointment. The power in this cause was exercised by will, in such a way that the appointee became entitled to all the property, instead of an aliquot part. While the property came to him by deed from his grandfather, only a part of it could have reached him but for the will of his aunt. His title to the most of it depended on the will, as well as upon the deed. He is compelled to resort to the will in order

to establish his right, for the deed alone will not suffice. The privilege of making a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the legislature sees fit to create. The payment of a sum in gross,
225 or of an amount measured by the value of the property affected, may be exacted, or the right may be limited to one or more kinds of property and withdrawn as to all others. The legislature could provide that no power of appointment should be exercised by will, or that it should be exercised only upon the payment of a gross or ratable sum for the privilege. It could exact this condition, independent of the date or origin of the power. All this necessarily flows from the absolute control by the legislature of the right to make a will. (Matter of Sherman, 153 N. Y. 1, 4; Matter of Dows, 167 N. Y. 227, 231; Magoun *v.* Illinois Trust & Sav. Bank, 170 U. S. 283; United States *v.* Perkins, 163 U. S. 625, 628; Mager *v.* Grima, 8 How. (U. S.) 490, 493.)

We do not regard the question presented as open in this court, for we have recently passed upon it in two cases, each of which arose under the statute as amended in 1897. In the earlier case a testator, who died in 1885, created a trust fund and gave the income thereof to his son during life, but directed that upon his death the principal should be paid to his issue in such shares or proportions as he should by will appoint, with a gift directly to such issue if the power of appointment was not exercised. The son died in 1899, leaving a will by which he exercised the power. We held, adopting the opinion of the court below, that, although the ultimate right of succession to the fund was not taxable under the statute in force when the father died, still the shares of the appointees
226 under the son's will were subject to a transfer tax under the act of 1897. (Matter of Vanderbilt, 50 App. Div. 246; 163 N. Y. 597.)

In the second case the testator died in 1880, after devising certain real property in trust to pay the income to his son during life and upon his death said realty was to vest absolutely and at once in such of his children and the issue of his deceased children as he should by will appoint. If, however, the son should die intestate, the realty was to vest absolutely and at once in his children then living and the issue of his deceased children. The son exercised the power by his last will and died in 1899. We held that the property was subject to the tax imposed by the act of 1897; that such tax was on the right of succession and not on the property; that whatever may be the technical source of title of a grantee under a power of appointment, in reality and substance it is the execution of the power that gives to the grantee the property passing under it and that when the father devised the property to the appointees under the will of his son he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will. (Matter of Dows, 167 N. Y. 227; affirmed, *sub nom:* Orr *v.* Gilman, 183 U. S. 278)

The Supreme Court of the United States reviewed our de-
227 cision, and after due consideration of the statute in ques-
tion, was unable to see that as construed by us it infringed any provision of the Federal Constitution.

The learned judges below did not consider the Dows case in their opinion, but they attempted to distinguish the Vanderbilt case from the one in hand upon the ground that the power of appointment was created by will and that the will was made after the enactment of the Collateral Inheritance Tax Law. The latter distinction did not exist in the Dows case, where the power was created before any act was passed in this state providing for the imposition of a succession or transfer tax.

We think neither distinction is well founded. As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not affected by its origin. If created by deed its efficiency is the same as if it had been created in the same form by will. No more and no less could be done by virtue of it in the one case than in the other. Its effective agency to produce the result intended is neither strengthened nor weakened by the nature of the instrument used by the donor of the power to create it. The power, however or whenever created, authorized the donee by her will to divest certain defeasible estates and to vest them absolutely in one person. If this authority had been conferred by will,
instead of by deed, the right to act would have been pre-
228 cisely the same and the power would have neither gained
nor lost in force. The statute applies to all powers alike, without distinction on account of the method of creation or the date of creation, and provides that the exercise of the power shall be deemed a taxable transfer of the property affected, the same as if it had belonged absolutely to the donee of the power and had been bequeathed or devised by such donee. As we said through Judge Cullen in the Dows case: "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." This accords with the statutory definition of a power as applied to real estate, for it includes authority to create or revoke an estate therein. (Real Property Law, § 111.) Such was the effect of the exercise of the power under consideration, for it both revoked and created estates in the real property and interests in the personal property. No tax is laid on the power, or on the property, or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act. If the power had been exercised by deed, a different question would have arisen, but it was exercised by will and owing to the full and complete control by the
legislature of the making, the form and the substance of wills,
229 it can impose a charge or tax for doing anything by will.

It is quite immaterial that there was no statute imposing a succession tax of any kind in force when the orignal disposition of the property was made and the power was created. That transfer

is not taxed and the statute makes no effort to reach it. It is the practical transfer through the exercise of the power by will that is taxed and nothing else. The right of the legislature to impose a tax on the privilege of exercising a power by will is not affected by the fact that no such tax was imposed when the power was created. When the creator of the power granted the property to the appointees of his daughter, as Judge Cullen said in the Dows case, "he necessarily subjected it to the charge that the state might impose on the privilege accorded to the" daughter "of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate by the" daughter herself, "that is, for the privilege of succeeding to property under a will." If the power had not been exercised, the question would have resembled that presented by the Pell case, relied upon below, where we held that a statute was unconstitutional which imposed a tax upon such remainders, already vested and non-defeasible, as should result in an absolute title after the passage of the act. (Matter of Pell, 171 N. Y. 48.) In that case the transfer was completed without the aid of a will and
230 the effect was the same as a deed *inter vivos*. There was no foundation for a succession tax, which is a charge upon the right to make a will, or on the right to inherit without a will.

We think that the surrogate had jurisdiction and that his order denying the motion to dismiss the proceedings as to the respondent was proper. It follows that the order of the Appellate Division should be reversed and that of the surrogate affirmed, with costs.

Parker, Ch. J, Bartlett, Haight and Cullen, JJ., concur; O'Brien and Werner, JJ., dissent.

Order reversed, etc.

231 [Endorsed:] In the Matter of the Transfer Tax upon the Property transferred and appointed by the Last Will and Testament of Laura Astor Delano. Opinion.

232 *Opinion of Appellate Division in Matter of Delano (82 App. Div., 147).*

Supreme Court, Appellate Division, First Department, March, 1893.

Chas. H. Van Brunt, P. J., Edward Patterson, Morgan J. O'Brien, George L. Ingraham, Edward W. Hatch, JJ.

No. 5065.

In the Matter of the Transfer Tax upon the Property transferred and Appointed by the Last Will and Testament of LAURA ASTOR DELANO, Deceased.

Appeal from Order Denying Motion to Dismiss Proceedings Brought to Tax Property Transferred and Appointed, so far as They Relate to the Appellant.

This proceeding was brought to appraise and assess for the purpose of taxation under the Act relating to taxable transfers (Chapter 908 Laws 1896 as amended by Chapter 284 Laws 1897) the property of Laura Astor Delano who died June 15th, 1902, leaving a last will and testament; and Arthur Astor Delano was notified to appear therein. His attorneys gave notice of appearance in his behalf, but only for the purpose of objecting to the jurisdiction of the Surrogate's Court, and applied to the Surrogate to dismiss the proceeding as to him and as to certain property mentioned in two deeds one dated September 30th, 1848 and the other September 6th, 1849, made by William B. Astor giving to his daughter, Laura Astor Delano, the testatrix, a power of appointment which power
233 she exercised in her will in favor of the said Arthur Astor Carey. The basis of the application was that the Surrogate had no jurisdiction over the property in question; and annexed to the affidavit of the attorneys were the two deeds mentioned.

By the first of these deeds given in 1848, twenty-six years before his death, William B. Astor (and his wife) conveyed certain real estate to Laura Astor Delano for her life, conditions being therein stated upon the happening of which her estate should cease and determine and other conditions being included disposing of the property to certain persons named upon her death. The deed then continues: "Provided however, and power is hereby granted unto the said Laura, in her discretion to give the said land and premises or any share or part thereof to and amongst her said issue, brothers, sister Alida, or their issue, (the same persons to whom it would by the deed pass were the power not exercised) in such manner and proportions as she may appoint by instrument in its nature testamentary to be acknowledged by her as a deed in the presence of two witnesses or published by her as a will." Power was also given her and the manner and conditions of its exercise stated, whereby she might lease the property or mortgage or sell it (in

the latter case the proceeds to be considered as the property itself"; and the deed contained a reservation to the grantors whereby they might, during the life of their daughter, "appoint, convey and settle the said land and premises hereby granted to her sole and separate use in equity, notwithstanding her coverture with remainders as to them or the survivor of them as may seem fit."

234 By the deed of 1849, William B. Astor in consideration of love and affection to his daughter Laura Astor Delano, granted and transferred to trustees named "Fifty thousand dollars of the Public Debt of the State of Ohio" in the form of certificates, "To receive the interest and income thereof and to apply the same as it shall be received, to the use of the said Laura during her life * * * and upon the further trust, upon her death to transfer and convey the capital of the said stock to the issue of the said Laura surviving her * * * But if she shall leave no issue surviving her then to transfer the said capital to her surviving brothers and sister Alida and to the issue of any of them who may have deceased leaving issue then surviving." Then follows the provision: "Provided however that it shall be lawful for the said Laura by any instrument executed duly as a will of personal estate, to dispose of the said capital into and amongst her issue, brothers, sister and their issue, in such shares and proportions as she may think fit and upon such limitations by way of trust or otherwise as in her discretion may be lawfully devised." A power of sale was also given her with conditions similar to those in the deed of real estate, it being provided that if the certificates were sold "the fund into whatever form it may thus be changed shall stand upon the same trusts, limitations of interest and powers as are herein expressed both as to income and capital."

After the execution of these deeds, the daughter during her lifetime received the benefits of the property so conveyed to her which remained intact; and, in the second clause of her will,—she

235 having previously disposed of other property to other persons,—she gave, devised, bequeathed and appointed to her nephew Arthur Astor Carey, the property "described in the deed * * * deed of settlement bearing date September 30th, 1848, To Have and to Hold * * * and to his heirs and assigns forever;" and also devised, bequeathed, limited and appointed to her said nephew, Arthur Astor Carey, "Fifty thousand dollars of the Public Debt of the State of Ohio or the proceeds thereof particularly mentioned and described in the * * * deed of settlement bearing date September 6th, 1849, To Have and To Hold * * * and to his heirs and assigns forever."

The application to dismiss, as to Arthur Astor Carey and the property which he thus became entitled to receive, the proceeding brought to appraise and tax the estate of Laura Astor Delano under the Act relating to Taxable Transfers, was denied and from the order so entered, he appeals.

Lucius H. Beers, for appellant.

George M. Judd, for respondent.

O'BRIEN, *J.*:

The portion of the Transfer Tax Law which it is claimed is applicable to the property appointed to the appellant, is Subdivision 5 of Section 220 incorporated in the law by amendment by Chapter 248 Laws 1897, and providing that: "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer
236 taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will * * *.

In terms the amendment would seemingly apply to the property here in question because a studied effort has been made by the language employed in the Act to destroy any distinction between the disposition of property under a power of appointment made "before or after" the passage of the Act. The construction of language identically the same taken from Subdivision 3 of Section 1 of the Transfer Act of 1892 (Chap. 399 Laws 1892) was involved in the Seaman case (Matter of Seaman, 147 N. Y., 69) and therein it was held (head-note) that such language "is to be restricted to the case of grants or gifts *causa mortis*, mentioned in the preceding portion of the subdivision and does not extend to transfers by will or intestacy so as to subject to taxation rights of succession which accrued before the statute came into existence."

There is the same constitutional objection to giving the amendment of 1897 a retroactive effect so as to make it apply to instruments which existed and were in force before its passage as existed in the Seaman case. Similiarly in Matter of Pell (171 N. Y., 48) with reference to Chapter 76 of the Laws of 1899 which in terms imposed a transfer tax upon remainders and reversions vesting prior to 1885, it was decided that such a provision in the law was unconstitutional; and therein it was distinctly held, following the decision in Matter of Swift, (137 N. Y., 77) that the tax could not be sustained as one upon property but must be supported as a tax upon the
237 right of succession. As said in Matter of Pell (*supra*): "This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It therefore, follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it can not be reached in that form of taxation."

Under the deeds of William B. Astor which are before us for consideration, the rights of the relator were vested and were, under well settled rules of law, created by the donor of the power and not by the donee by whom the power was exercised. In Root *v.* Stuyvesant (18 Wend. 257), it is said: "It appears to be well settled that until the execution of the power, the remainders or limitations over take effect the same as if no such power existed or as in case of default of execution of it * * * The doctrine is very clearly and succinctly stated by Fearne; and Sugden, after discussing the cases

on the point, observes that the result of the authorities is that the power of appointment does not prevent the vesting of the estates limited in default of appointment. They are, of course, subject to be divested on the execution of the power." With respect, therefore, to the interests of the relator, we must have in mind the rule that the estate of the appointee under a power is derived from the donor of the power and not from the donee. Under this familiar rule, the interests of Arthur Astor Carey became vested under the deeds made by William B. Astor in 1848 and 1849 and he would have succeeded to such vested interests had their been a de-
238 fault in the exercise of the power of appointment.

It is true that the donee in the exercise of the power of appointment had the right to determine between the individuals in the class in whose favor she was to exercise the power; but although this rendered the interests of any of the individuals in the class subject to be divested it created no distinction different from what would have existed if the property had been originally given to Laura Astor Delano for life with remainder over to persons named whose interests were to be divested in the event of their dying before the termination of the life estate. The relator could have been divested of his interests by the exercise of the power of appointment in favor of any other member of the class to whom it was limited and he may have obtained a much greater estate by reason of the fact that the power was exercised exclusively for his benefit. It follows, nevertheless, that his rights were obtained under the deeds of the donor which were made long prior to the enactment of any inheritance tax law and, therefore, it is only by regarding the transfer act as imposing a tax upon property which it was held in the Pell case (*supra*) could not in the guise of a succession tax be done, that the interests of the relator can be taxed under it.

We have not overlooked Matter of Vanderbilt (50 App. Div., 246; aff'd 163 N. Y., 597) wherein the construction of this same subdivision of the Statute was involved as bearing upon a case where a testator who died in 1885, by will gave to his son the income of a trust fund during his life and power to dispose of the principal by will to his issue. This power having been exercised on the death of the son in 1899, it was held that the disposition of the prop-
239 erty made under such appointment was taxable under the Act. That decision, however, which at first blush might seem to be controlling, is distinguishable in two features; one that the power of appointment itself was created by will, and the other that such will was made and went into effect at a time subsequent to the enactment of a collateral inheritance tax law. The power of appointment here involved was not given by law but was conferred by deed; and at the time the interest of the relator vested, there was no inheritance tax or transfer tax law in existence.

Upon reading the authorities it will be found that the cases point out specifically the fundamental distinction between the power of appointment created by deed and one created by will, as regards the right of the Legislature to impose a transfer tax. As stated, to impose a tax upon a transfer by deed is the exercise of the general tax-

ing power of the State; while a tax upon a power of appointment which has been created by will, is a succession tax depending upon a transfer brought about by death. It is not claimed for this amendment of 1897 that it was the exercise of the general taxing power of the State; and to be supported, therefore, it must be, if at all, upon the theory that it imposes a succession tax.

As said in Matter of Swift, 137 N. Y., 83, "The idea of this succession tax, as we may conveniently term it, is more or less compound; the principal idea being the subjection of property, ownership of which has ceased by reason of the death of its owner, to a diminution by the State, reserving to itself a portion of its amount, if in
240 money, or of its appraised value if in other forms of property." And in Matter of Sherman (153 N. Y., 3) it was said: "The power of a State to tax the right of transfer of property by will or the right of succession under the intestate laws of the state is not an open question. It results from the acknowledged principle that the right to dispose of property by will and of succession thereto in cases of intestacy is derived from and under the municipal law * * * It is a tax upon the right of transfer by will or under the intestate law of the state."

It is not, however, within the power of the Legislature merely by calling a tax one upon the right of succession to impose what in substance and effect is a tax upon property. In terms, unquestionably, the Legislature has called the estate which the relator has received, a succession and upon the right to such succession has attempted to impose a tax; but it cannot change the legal nature or character of the property interest by applying to it a name, nor can it impose a tax upon property which the relator has received under the deeds of William B. Astor given in 1848 and 1849 by subsequently enacting that to such property the relator has succeeded under the will of Laura Astor Delano and that as to it a tax is due as a tax upon the right of succession as though it was the property bequeathed or devised by her.

Having in mind, therefore, the fact that the relator obtained his property rights by deed and not by will and at a time when there was no transfer tax or inheritance tax law in existence and that he does not obtain his estate by right of succession under the will
241 of Laura Astor Delano but acquires it under the deeds of William B. Astor which were in no sense testamentary in character but were made many years before the grantor's death, it follows, we think, that the attempt of the Legislature to tax such property rights, can not succeed and for the reasons that we have briefly outlined, namely, that to uphold the tax here sought to be imposed under the guise of taxing a right of succession, would in fact be to sanction a tax upon property and for that purpose to give to the amendment of 1897 a retroactive effect which would be violative of the Constitution.

The conclusion renders it unnecessary for us to discuss or determine the question which has been urged by the appellant with much force that in the present instance the Surrogate's Court had no jurisdiction to entertain the proceeding for the purpose of levying the tax.

We think that the order of the Surrogate should be reversed with costs and the proceeding dismissed as to the appellant.

All concur.

This certifies that the foregoing is a true copy of the opinion now on file in our office, rendered April 17, 1903, on the decision of the above entitled appeal; that we have compared it with the original, and that it is a correct transcript therefrom, and of the whole of the original.

Dated, New York, Jan. 31, 1906.

STOREY & DOANE,
Stenographers, Supreme Court,
Appellate Division, First Department.

242 [Endorsed:] 5065. Supreme Court, Appellate Division, First Department. Matter of Delano. Opinion.

243 [Endorsed:] United States Supreme Court, in Error to the Surrogates' Court of New York County. Winthrop Astor Chanler, and Others, Plaintiffs in Error, against Otto Kelsey, Comptroller of the State of New York, Defendant in Error. Stipulation and Opinions.

Endorsed on cover: File No. 20,152. New York county Surrogate's court. Term No. 240. Winthrop Astor Chanler, Thomas T. Sherman, as Committee for John Armstrong Chanler *et al.*, plaintiffs in error, *vs.* Otto Kelsey, comptroller of the State of New York. Filed March 28th, 1906. File No. 20,152.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 240.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
T. SHERMAN, AS CLERK.

WINTHROP ASTOR CHANLER, THOMAS COMMITTEE FOR JOHN ARMSTRONG CHANLER ET AL.,
Plaintiffs in Error,

vs.

OTTO KELSEY, COMPTROLLER OF THE STATE OF NEW YORK,
Defendant in Error.

ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY IN THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

LUCIUS H. BEERS,
Counsel for Plaintiffs in Error.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

EVENING POST JOB PRINTING OFFICE, NEW YORK

Supreme Court of the United States.

WINTHROP ASTOR CHANLER, THOMAS T. SHERMAN, as Committee for John Armstrong Chanler, *et al.*,
Plaintiffs in Error,

vs.

OTTO KELSEY, Comptroller of the State of New York,
Defendant in Error.

October Term, 1906.
No. 240.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of Facts.

This case arises on writ of error to the Surrogate's Court (p. 123) of the County of New York, State of New York, to review a determination of the Court of Appeals of that State sustaining an order of the Surrogate's Court imposing a "transfer tax" on certain remainders appointed to the plaintiffs in error by Laura Astor Delano, deceased.

The facts are undisputed.

These remainders were created and appointed as follows:

William B. Astor, on the occasion of the marriage of his daughter, Laura, to Franklin H. Delano, in the year 1844, executed a *deed* in the nature of a marriage settlement (pp. 89 to 92), conveying

certain real property, now valued at $1,827,450 (pp. 11 to 16), and certain personal property, now valued at $143,169.46 (pp. 18 and 19), to trustees, in trust, to pay the income to his daughter Laura for life, and granting the remainder to her issue in fee, or in default of issue to her heirs in fee, but giving to his daughter power, in her discretion, to appoint the remainder "amongst her said issue or "heirs, in such manner and proportions as she may "appoint by instrument in its nature testamentary, "to be acknowledged by her as a deed and in the "presence of two witnesses or published by her as "a will" (p. 91).

In the year 1848, and again in 1849, and again in 1865, William B. Astor made other deeds by way of addition to the original marriage settlement, all substantially similar in their terms (pp. 84, 87 and 93). All of these deeds were absolute and irrevocable, taking effect on delivery and not made in contemplation of the death of the grantor, nor made to take effect at his death. William B. Astor, in fact, lived until November 24, 1875 (p. 68).

Mrs. Laura Astor Delano died June 15, 1902, in Geneva, Switzerland (p. 48). She was not a resident of the State of New York (pp. 71 and 83); she left no descendants (p. 69).

Previous to her death she had executed an instrument (pp. 75 to 80) which has generally been referred to in the record as her "will." It was in part a will disposing of property of which she died seized or possessed (p. 79), and it was also in part an Instrument of Appointment exercising the powers granted to her by the *deeds* above referred to, and also exercising certain powers given to her by the will of her father, William B. Astor.

The codicil (pp. 80 to 82) was an alteration of the will and related only to property owned by Mrs. Delano. It did not affect the appointments.

A transfer tax was paid to the State of New York without objection on such property, real and personal, within the State, as was owned by Mrs. Delano at her death; also on such property as was appointed by her under powers created by the *will* of her father, William B. Astor. But, in addition to this, the defendant in error claimed that a "transfer tax" had also been imposed on the property appointed by Mrs. Delano under the powers created by the *deeds* above referred to.

The statute purporting to impose such tax was an amendment passed in 1897 (Chap. 284, Laws 1897) to the General Transfer Tax Law of the State of New York. For brevity that statute will be referred to as the Amendment of 1897. It is now sub-division 5 of Section 220 of the General Tax Law of the State of New York. It provided as follows:

> "Whenever any person or corporation shall "exercise a power of appointment derived "from any disposition of property made "either before or after the passage of this "act, such appointment when made shall be "deemed a transfer taxable under the pro- "visions of this act in the same manner as "though the property to which such appoint- "ment relates belonged absolutely to the "donee of such power and had been be- "queathed or devised by such donee by will; "and whenever any person or corporation "possessing such a power of appointment so "derived shall omit or fail to exercise the "same within the time provided therefor, in "whole or in part, a transfer taxable under "the provisions of this act shall be deemed to "take place to the extent of such omissions "or failure, in the same manner as though "the persons or corporations thereby becom- "ing entitled to the possession or enjoyment "of the property to which such power related "had succeeded thereto by a will of the donee "of the power failing to exercise such power, "taking effect at the time of such omission "or failure."

Under the practice, which has for some years prevailed in Surrogates' Courts in the State of New York, the transfer tax on appointed property is required to be adjusted in connection with the adjustment of the tax on property passing by the will. It was therefore necessary to raise all questions connected with the tax in the proceeding brought by Mrs. Delano's executors to have the tax adjusted on the property of which she was seized or possessed.

Among those who were made parties to that proceeding to assess the tax was Arthur Astor Carey, one of the plaintiffs in error herein. He is a grandson of William B. Astor, and was the appointee to whom Mrs. Delano had appointed all of the property originally transferred by the deeds of 1848 and 1849.

As soon as he was served with process in that proceeding in the New York Surrogate's Court, he applied to that Court to have the proceeding dismissed as to him, on the ground that no tax could constitutionally be imposed under the Amendment of 1897 on a remainder appointed to him under the terms of a power created by *deed,* which was not made in contemplation of death, and which took effect before there was any succession tax in New York State.

The question being one of constitutional law, the Surrogate made a *pro forma* order, denying the application to dismiss, leaving it to the Appellate Courts to consider the constitutional questions involved.

Mr. Carey then appealed to the Appellate Division of the Supreme Court, First Department, and the five Justices of that Court decided unanimously against the constitutionality of the amendment if applied to this case (*Matter of Delano,* 82 App. Div., 147; Record, pp. 135 to 140), their decision being summed up as follows, "to uphold the "tax here sought to be imposed under the guise

"of taxing a right of succession, would, in fact, be "to sanction a tax upon property, and for that pur- "pose to give to the amendment of 1897 a retro- "active effect which would be violative of the Con- "stitution" (p. 139).

From that decision of the Appellate Division the State Comptroller appealed to the Court of Appeals, where, by a divided Court (five for reversal and two for affirmance) the decision of the Appellate Division was reversed and Mr. Carey's application to have the decision dismissed as to him was denied (pp. 130 to 134). (*Matter of Delano*, 176 N. Y., 486.)

The decision of the Court of Appeals on Mr. Carey's application was not final in such a sense as would permit it to be reviewed by this Court, but as it then became necessary to go on with the proceeding for the assessment of the tax Mr. Carey, together with all the other plaintiffs in error, raised in that main proceeding the same constitutional questions which had been considered by the New York courts on the appeals above referred to. And as those questions had been passed upon, so far as the New York courts were concerned, the subsequent decisions in the main proceeding were *pro forma*, and appeals were taken to the Appellate Division (105 App. Div., 642), and to the Court of Appeals (183 N. Y., 543), raising the same federal questions for the purpose of their being finally considered by this Court, and a final order on the last remittitur from the Court of Appeals was entered in the Surrogate's Court, New York County (p. 112).

The same constitutional questions are presented by the appointment under the powers created by the deed of 1865 as under the appointment under the powers created by the three earlier deeds; but certain questions of construction of the appoint-

ment have arisen which make it difficult to state briefly the legal effect of the appointment made under the power created by that deed, and in the interest of brevity reference is here made particularly to the deeds of 1844, 1848 and 1849.

The assignments of error now relied on by the plaintiffs in error (pp. 113 to 120) present the federal questions on which this litigation is based and which have been raised at every step as it has proceeded. Those questions were first raised when the defendant in error attempted to introduce evidence before the tax appraiser for the purpose of having a tax imposed on the property appointed under the powers created by the *deeds* (p. 51). They were again raised on appeal to the Surrogate (pp. 39 and 44), again on appeal to the Appellate Division (p. 4) and again on appeal to the Court of Apeals (p. 108).

The plaintiffs in error claim that the Amendment of 1897, as applied to this case, is unconstitutional, both under Section 10 of Article 1 and under the Fourteenth Amendment. But the objections they urge under each of those provisions are separate from and independent of the objections urged under the other provision.

Specification of Errors.

Briefly stated, the claims of the plaintiffs in error are:

That they rely for their title to these remainders on *deeds* made many years before there were any succession taxes in New York State, and do not rely on any "privilege" of making a "will" granted to Mrs. Delano by the State of New York. That the powers were created by contracts and that the right to exercise them in full and to have them exercised in full were contract rights not depending on any privilege granted by the State, and that

the Court of Appeals has therefore erred in refusing to hold that the Amendment of 1897 is unconstitutional and void as being repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of contracts made prior to the enactment of the Statute.

Also, that the remainders in question were not the property of Mrs. Delano, that she did not die seized or possessed of them, and that the instrument by which she appointed them, in so far as it exercised the powers, was not legally a "will," and that the Amendment of 1897 in enacting that such remainders should *"be deemed"* to be Mrs. Delano's property, when they were not her property, and should be taxed *"as though"* they had belonged to her, when they did not, in fact, belong to her, and as though they "had been bequeathed and devised "by her *by will,"* when they were not in fact devised or bequeathed by her by will, was a taking of the property of these plaintiffs in error without due process of law, and that the Court below erred in not holding the Amendment of 1897 to be unconstitutional and void under the XIV Amendment to the Constitution of the United States for that reason.

That no transfer of the remainders in question has been caused by the death of the owner of such remainders, and that the power of the State to impose a succession tax has not been called into being.

The amount of the tax on the property so appointed to the plaintiffs in error is upwards of $120,000 (pp. 32 to 37).

The case is unusual in its facts, for the trusts created in 1844 continued for fifty-eight years. This is probably one of the last survivals of a class of cases where powers of appointment were created by deed made usually by way of marriage settle-

ment and made before the Married Women's Acts were generally adopted in the United States. The case, nevertheless, presents an existing condition of law, and, therefore, it may properly claim the attention of this court if that law is not in accordance with the United States Constitution, for the Amendment of 1897 is now the law of the State of New York.

In the following points it has been necessary to refer with some repetition to the fact that there has been no succession caused by the *death* of the former *owner* of the property taken. This could not well be avoided, for the fact so stated constitutes the essential distinction between this case and the earlier cases where powers were created by *will* and where there was a succession caused by the death of the former owner of the property. The fact, therefore, is of primary importance in deciding what principles of law shall here be applied, and in discussing those principles it is necessary to look at it from various points of view.

FIRST POINT.

The power of the State to take property by means of a succession tax arises only when the succession is caused by the death of the former owner of the property taken.

I.

"DEATH IS THE GENERATING SOURCE FROM WHICH THE PARTICULAR TAXING POWER TAKES ITS BEING."

Knowlton v. *Moore*, 178 U. S., 41, 56.
Cahen v. *Brewster*, 203 U. S., 543, 550.

In New York the tax imposed by the Amendment of 1897 and under the statute which it amends is arbitrarily called a "Transfer Tax," but it is imposed only on that class of transfers which are caused by will, by the intestate law or by deed or gift, intended to take effect after death (Chapter 908, Laws 1896, Sec. 220). The "Transfer Tax" is, therefore, a succession tax; that is, an exercise by the State of its power over the disposition of the property of deceased persons.

Such taxes have been held to rest on the principles that the State possesses the ultimate control over property, the owner of which has died; that therefore the right to take by will or under the intestate laws is a privilege granted by the State, and that therefore it is competent for the State to revoke that privilege in part and retain a portion of the property of deceased persons in the form of a succession tax.

In *Mager* v. *Grima* (8 How., 490, 493), Mr. Chief Justice Taney, in discussing a State law imposing a succession tax, remarked:

> "Now the law in question is nothing more "than an exercise of the power which every "state and sovereignty possesses, of regulat- "ing the manner and term upon which prop- "erty real or personal within its dominion "may be transmitted by last will and testa- "ment, or by inheritance; . . . . And "if a State may deny the privilege altogether, "it follows that, when it grants it, it may "annex to the grant any conditions which it "supposes to be required by its interests or "policy. . . . ."

In *United States* v. *Perkins* (163 U. S., 625), Mr. Justice Brown discussed the history and nature of such taxes and remarked (p. 627) that:

> "While the laws of all civilized States "recognize in every citizen the abso- "lute right to his own earnings, and

> "to the enjoyment of his own property, "and the increase thereof, during his life, ex- "cept so far as the State may require him to "contribute his share for public expenses, "the right to dispose of his property by will "has always been considered purely a crea- "ture of statute and within legislative con- "trol" . . . . "the so-called inheritance "tax of the State of New York is in reality "a limitation upon the power of a testator to "bequeath his property to whom he "pleases;" . . . .

Again, in *Magoun* v. *Illinois Trust & S. Bank* (170 U. S., 283), Mr. Justice McKenna, in delivering the opinion of the Court, referred to the earlier decisions of this Court, and based his conclusions on the same principles.

Again, in *Knowlton v. Moore* (178 U. S., 41), Mr. Justice White, in delivering the opinion of this Court, discussed at length the history and essential character of inheritance and succession taxes, starting with the Roman law and the laws of the Continent of Europe, and tracing the subject in the laws of England and then in the laws passed by Congress and by our various State Legislatures. The conclusions reached from this study he stated thus (p. 56):

> ". . . . Although different modes of "assessing such duties prevail, and although "they have different accidental names, such "as probate duties, stamp duties, taxes on "the transaction or the act of passing of an "estate or a succession, legacy taxes, estate "taxes or privilege taxes, nevertheless tax "laws of this nature in all countries rest in "their essence upon the principle that *death "is the generating source from which "the particular taxing power takes its "being."* . . . .

(The italics above are our own but the sentence is so significant as to have been quoted with ap-

proval by Mr. Justice McKenna in *Cahen* v. *Brewster,* 203 U. S., 543, 550, as stating the essential basis of the tax.)

And again (p. 57):

> "Confusion of thought may arise unless it "be always remembered that, fundamentally "considered, it is the power to transmit or "the transmission or receipt of property by "death which is the subject levied upon by "all death duties. The qualification of such "taxes as privilege taxes, or describing them "as levied on a privilege, may also produce "misconception, unless the import of these "words be accurately understood." . . . .

The words last quoted point directly to the error complained of in this case, for the Court of Appeals has sustained this exaction on the theory that there was a "privilege," although these appointees do not rely for their title on the Statute of Wills or on the intestate laws, for there has been no succession caused by the death of a former owner of these remainders.

Again, in *Plummer* v. *Coler* (178 U. S., 115, 124), Mr. Justice Shiras, in delivering the opinion of this Court, quoted with approval from an opinion of Chief Judge Andrews of the New York Court of Appeals (rendered in *Matter of Sherman,* 153 N. Y., 1), as follows:

> ". . . . The so-called tax is an exac- "tion made by the State in the regulation of "the right of devolution of property of dece- "dents, which is created by law, and which "the law may restrain or regulate. Whatever "the form of the property, the right to suc- "ceed to it is created by law, and if the prop- "erty consists of government securities, the "transferee derives his right to take them as "he does his right to take any other property "of the decedent, under the laws of the State, "and the State by these statutes makes the "right subject to the burden imposed."

The New York Court of Appeals and the highest courts of other States have uniformly and repeatedly held to the same effect,

Matter of Swift, 137 N. Y., 77, 83.
Matter of Sherman, 153 N. Y., 1, 3, 4, 5.
Matter of Lansing, 182 N. Y., 238, 248.
Minot v. *Winthrop,* 162 Mass., 113.
Re Wilmerding, 117 Cal., 281.
State v. *Dalrymple,* 70 Md., 294.
State v. *Henderson,* 160 Mo., 190.
State v. *Alston,* 94 Tenn., 674.
Kochersperger v. *Drake,* 167 Ill., 122.
Strode v. *Commonwealth,* 52 Pa. St., 181.

It will appear from these authorities that in order to permit the imposition of a succession tax there must be a situation where the power of the State to regulate the succession to the property of a *deceased* person has been called into being by the *death* of the *owner* of the property.

No such situation has arisen in the history of the property appointed to the plaintiffs-in-error since the time when it belonged to their ancestor William B. Astor prior to the making of the first deed in 1844.

It follows as a corollary to the above that:

II.

THE VALIDITY OF A SUCCESSION TAX DEPENDS, NOT ON THE GENERAL TAXING POWER OF THE STATE, BUT ON THE EXISTENCE OF A POWER IN THE STATE TO REGULATE THE PARTICULAR SUCCESSION SOUGHT TO BE "TAXED."

In a series of decisions this Court and the New York Court of Appeals have held that this is not a tax on property, and this Court has cited, with approval, a decision of the Court of Appeals, holding that, "It is not a tax upon persons."

United States v. *Perkins,* 163 U. S., 625, 629.

United States v. *Perkins* presented a case where the State had no power to tax *the legatee,* for the legatee there was the United States, and in *Plummer* v. *Coler,* (178 U. S., 115), a case was presented where the State had no power to tax *the property* transferred, which, in that case, were United States Government bonds. Yet, in both cases, the imposition of a transfer tax was sustained by this Court, and in both cases where the State had no power to tax the person or the property the exaction was sustained not by reason of the State's power to impose a tax but by reason of the power of the State to regulate that particular succession to that particular property which had been left by the death of its owner.

This so-called "tax" in its essential character is, therefore, a part of the State's power to regulate succession to the property of a decedent rather than a part of the State tax laws; for the exaction has repeatedly been enforced as a condition to such succession where it could not have been enforced as a tax in the ordinary sense of that word.

Thus, Mr. Justice Brown, in delivering the opinion of the Court in *United States* v. *Perkins* (163 U. S., 625, 628), said:

> ". . . . we know of no legal principle to "prevent the legislature from taking away or "limiting the right of testamentary disposi- "tion or imposing such conditions upon its "exercise as it may deem conducive to pub- "lic good.
>
> "In this view, the so-called inheritance "tax of the State of New York is in real- "ity a limitation upon the power of a tes- "tator to bequeath his property to whom he "pleases;" . . . .

This holds that the "so-called inheritance tax" is essentially a partial repeal of the Statute of Wills and it was on that principle that it was held that New York State would take part of certain property bequeathed to the United States.

It is not necessary to decide now whether the modern State can, by repealing the Statute of Wills and the Intestate Laws, become the heir of every one. The State unquestionably has the power to create and to alter the privilege which it gives in the Statute of Wills and in the Intestate Laws, and it must follow that as a part of that power it can make it a condition to the privilege of succession that part of the property involved shall pass to the State.

So far as concerns the essential basis of this "tax," it makes little difference here whether this taking of part of the property by the State is a partial resumption of an ultimate right of ownership in all property which has been left by the decease of its former owner or is a charge exacted for availing of the privilege which the State has given in permitting that property to pass to devisees, legatees and next of kin. *In either case, the act of retention by the State of a part of the property is practically an amendment to the Statute of Wills*

and to the Intestate Laws. Or, as this principle was stated in *State* v. *Alston* (94 Tenn., 674, 681), ". . . . It is a retention by the State of a part of a deceased person's property which the State may take to meet its necessities, and which in "certain cases it may take *in toto,* as in the cases "of escheated property." . . . .

This obvious conclusion has an important bearing here, for from it it follows that the general power of the State to levy what may properly be called a "tax" cannot sustain the "tax" here and that to sustain the exaction sanctioned by the Court below, it must be shown that New York State had power to make this exaction by reason of its power to make and to alter the Statute of Wills so as to permit or to curtail *this particular appointment.*

But an examination of the facts of this case will show that the Statute of Wills and the Intestate Laws had nothing to do with the transfer of this particular property to these appointees, and that these appointees relied for their title not on those Statutes but on the terms of deeds made *inter vivos* and not conditioned to take effect on the death of the grantor. And that if there had been no Statute of Wills and no Intestate Laws in New York State when these deeds were made, or if those statutes had been revoked after the deeds were made, the appointees would still have taken title to their remainders by virtue of the force of the original deeds.

In the broadest sense, all laws requiring money to be paid to the Government for public purposes are a part of the system of taxation and such exactions may, perhaps, in such a broad and somewhat indiscriminating sense be called "taxes." But that has never been allowed in this Court to complicate the questions which have arisen in reference to the validity of State inheritance tax statutes, and those statutes have been sustained where both the legatee and the property transferred were

not subject to the taxing power of the State. And this has been done by studying the essential nature of the tax and sustaining it as a part of the power of the State to regulate the particular succession then under consideration.

The plaintiffs in error ask that the same principles be applied to this case and ask the Court to apply here the same tests with respect to the power to regulate succession which have been held to be decisive in earlier cases which have called in question the validity of State inheritance tax statutes.

The *general taxing power* of governments may enable them to impose a tax on a succession, as on any other form of transfer, even where the succession may be under the laws of another jurisdiction; that is, the power to tax is not necessarily coterminus with the power to regulate the succession where the owner of property dies. (*Knowlton* v. *Moore,* 178 U. S., 41.) But in such a case there must be an exercise of the general taxing power of the government which imposes the tax, and that power must be exercised so as to conform with the constitutional limitations on the power.

Neither of these conditions are met in the present case, for here the Court of Appeals in its decision below has held that this was not an exercise of the general taxing power, and in the *Pell* case, where it discussed this particular subject at length, and where the case turned on these questions, it was held that in passing the Tranfer Tax Law and its amendments, New York State did not exercise its general taxing power, and that if it had intended to exercise that power the act would have been unconstitutional.

SECOND POINT.

The powers under which this property was appointed to the plaintiffs in error were created by deed *inter vivos* and that fact distinguishes this case from the case of Orr v. Gilman (183 U. S., 278), where the power was created by will.

It is important to observe that the property on which this tax was imposed below consisted wholly of remainders and of interests in personal property which were similar to remainders in land.

The entire property belonged to William B. Astor before the deeds of 1844, 1848 and 1849 were made. By those deeds he granted these remainders, not to his daughter, Mrs. Delano, but to a class of his descendants whom he designated and among whom she, as his agent, was given power to appoint the remainders.

The remainders were never her property, but, as agent of her father she designated the persons who were to take. That is, the grants evidenced by the deeds made in 1844, 1848 and 1849 were in a sense incomplete, and to meet this incompleteness the grantor provided that Mrs. Delano, as his agent, should designate those of a class of his descendants who should take the remainders. Her instrument of appointment was in law a part of a deed made between living persons, and not dependent for its effect in any way upon the death of the owner of the property.

It was as competent for William B. Astor to make one disposition of the life estate and another disposition of the remainder as for him to have divided a farm by a boundary fence and then dis-

posed of the easterly half in one manner and the westerly half in another. And the fact that the life estate in the lands and funds was given to Mrs. Delano has, as a matter of law, nothing to do with the questions presented with reference to these remainders.

In the case of *Orr* v. *Gilman*, 183 U. S., 278, this Court sustained the New York Court of Appeals in imposing a transfer tax on the transfer under an appointment under the Amendment of 1897. But in that case, as in almost all appointment cases, the power of appointment had been created by *will;* that is, the former *owner* of the property had *died* and the power was brought into being by his *death* and there was, in fact, a succession. That testamentary disposition was incomplete at the time when the will which created the power took effect, and it was *a part of that testamentary disposition* that the power of appointment should be afterward exercised. Whether it was then exercised by deed or by will was probably not important so far as its liability to a succession tax was concerned, for that exercise, however evidenced, was part of a succession caused by *death*, and the State had power to impose a tax at any time between the death of the original owner and the time when it ultimately vested in beneficial possession of the ultimate owner.

In *Orr* v. *Gilman*, this Court based its decision on this power of the State to impose a succession tax at any time during this period of administration, and cited in support of that view the earlier case of *Carpenter* v. *Pennsylvania* (17 How., 456), where a succession tax law had been passed after the death of the testator, but before the estate had been divided, and quoted from the opinion in the *Carpenter* case as follows (p. 285):

> ". . . . The rights of the donee are "subordinate to the conditions, formalities

> "and administrative control, prescribed by "the State in the interests of its public or- "der, and are only irrevocably established "upon its abdication of this control at the "period of distribution. If the State, during "this period of administration and control "by its tribunals and their appointees, thinks "fit to impose a tax upon the property, there "is no obstacle in the Constitution and laws "of the United States to prevent it."

Mr. Justice McKenna, in a recent succession tax case, discussed this subject and, after reviewing recent decisions, held:

> ". . . . There is nothing, therefore, "in those cases which restrains the power of "the State as to the time of the imposition of "the tax. It may select the moment of "death, or it may exercise its power during "any of the time it holds the property from "the legatee. . . . ."
>
> *Cahen* v. *Brewster*, 203 U. S., 543, 551.

This declares the precise distinction which is here contended for between this case and cases where powers are created by *will*; that is, that in such cases there is a *death* which calls into being the power of the State over the property of deceased persons and that that power, when so called into being, enables the State to impose a tax on the property at any time in the course of administration while it is passing through the legal machinery of succession provided by the State.

Here there has been no succession caused by the *death* of an *owner*.

Where powers have been created by *will* they originate on the *death* of the *owner*. There is in such cases, therefore, a succession and the State has power to impose a succession tax when the power is created or when it is exercised, or at any time before the property ultimately passes in

beneficial ownership and possession to the ultimate taker, for *the creation and exercise of the power are parts of one transfer* caused by, and originating in, the death of the former owner. This must follow from the principle that an instrument exercising the power is legally a part of the instrument which created the power.

> "An estate created by the execution of a "power, takes effect in the same manner as if "it had been created by the deed which raised "the power. The party who takes under the "execution of the power, takes under the au- "thority, and under the grantor of the power, "whether it applies to real or personal prop- "erty, in like manner as if the power, and the "instrument executing the power, had been "incorporated in one instrument."
>
> 4 *Kent's Commentaries,* 337.

See also:

> 2 *Wash. Real Property,* 320.
>
> *Emmons v. Shaw,* 171 Mass., 410 (and cases there cited).

In *Orr* v. *Gilman,* the instrument before the Court exercised powers created by will, and it was therefore legally a part of that will—a part of a succession caused by the death of the former owner. Here the instrument before the Court exercises powers created by deeds and is therefore legally a part of those deeds which were transfers *inter vivos.*

These distinctions between powers created by ancient deeds and powers created by wills go to the essential nature of the transaction involved in the creation and exercise of a power and to the essential nature of the State's power to tax.

The powers considered in *Orr v. Gilman* were created by the will of David Dows, Senior, whose will was admitted to probate in 1890, and the powers were exercised by his son in 1899. The partial testamentary disposition made in

1890 was not completed till 1899 or later, and from 1890 until some time after 1899, when the appointees went into possession, the property may be said to have been going through the legal machinery provided by the State for the disposition of property on the death of the owner. And the fact that the property necessarily went through that machinery gave the State the power to impose the succession tax for the privilege.

The State had power to impose that charge at any stage of the operation and to impose it more than once. It happened that there was an inheritance tax in New York before the first will took effect in 1890, but if there had not been the State would still have had the power to impose the tax at any time before the property passed beyond the machinery of succession.

Carpenter v. *Pennsylvania,* 17 How., 456.

Cahen v. *Brewster,* 203 U. S., 543.

In this case these remainders have not gone through this State machinery of succession. *If there had never been any statute of wills or any intestate laws in New York, these powers could have been created by deed, as they were, and exercised by instrument of appointment, as they were.*

The fact that the Instrument of Appointment (p. 75) executed by Mrs. Delano was for convenience connected with her will did not legally make it her will. This will be discussed in the Fifth Point.

If these deeds had been intended to take effect on the death of the grantor, a different question would be presented, for there would then have been a succession taking effect on the *death* of the former *owner.* But they were absolute transfers not in any way dependent for their effect on the death of the grantor. They were transfers *inter vivos* which took effect upon their delivery.

THIRD POINT.

The Amendment of 1897 was not an exercise of the State's general power to tax, but was intended to impose a succession tax.

The claim has heretofore been made in this Court that succession tax laws passed by States have violated the Fourteenth Amendment by providing for certain increases in the rate of taxation and certain exemptions and inequalities. But that claim has always been disposed of by pointing out that the exaction was *a succession tax*, and therefore that the power to impose it was a part of the State's power to regulate succession in case of death and was not subject to the limitations which exist in cases of an exercise of the State's general power of taxation, that is, the imposition of a tax on property or on persons. As was observed by Mr. Justice Brewer in a dissenting opinion in such a succession tax case (*Magoun* v. *Trust & Savings Bank*, 170 U. S., 283, 302):

> "It seems to be conceded that if this were "a tax upon property such increase in the "rate of taxation could not be sustained, but "being a tax upon the succession it is held "that a different rule prevails." . . . .

It is important to notice that this statement of Mr. Justice Brewer was made with reference to the absence of power in a State in the exercise of its general taxing power to pass a tax statute containing exemptions and inequalities; that is, it is to be regarded as a statement of the effect of the XIVth Amendment. The decision of this Court in *Knowlton* v. *Moore*, 178 U. S. 41, is, therefore, not contrary to this statement of the law. For, in the lat-

ter case, this Court was considering the act of Congress and was, therefore, considering not the XIVth Amendment but the constitutional limitations imposed on Congress.

But it is not necessary for the Court to consider here, whether the statute would be constitutional if it were regarded as an exercise of the general taxing power of the State, for the New York Court of Appeals has in this case held that the statute in question "does not attempt to impose a tax upon "property, but upon the exercise of the power of "appointment" (p. 131).

This is directly in line with the series of decisions by the New York Court of Appeals, and particularly with their decision in *Matter of Pell* (171 N. Y., 48), where this very question was under consideration.

On the general constitutional question the Court there held (p. 60):

> "This amendment is clearly unconstitu-
> "tional in another respect, as it does not ap-
> "portion the burden equally among the own-
> "ers of estates sought to be taxed, for it im-
> "poses on some five per cent, on others one
> "per cent, and as to others nothing at all."
> . . . .

The Court then went on to hold that the statute in question was not an exercise of the general power to tax, but imposed a succession tax, but that it impaired contracts and was therefore unconstitutional.

It does not appear clearly from the words above quoted whether the Court of Appeals was there referring to provisions of the Constitution of the United States or of the Constitution of the State of New York. The report of the case indicates that counsel for the appellant had invoked the provisions of both constitutions and the Court

of Appeals in an earlier case (*Stuart* v. *Palmer*, 74 N. Y., 183, 189) had held that where one person was required to pay more than his share of a tax the exaction "may properly be styled extortion or confiscation." A New York statute which imposed a tax on persons or on property with such discrimination would, therefore, probably come within the provisions of the New York Constitution, Art. I, Sec. 6, which provides that no person shall be deprived of "property without due process of law; nor shall private property be taken for public use without just compensation."

If, therefore, the decision of the Court of Appeals, above quoted, construes the New York Constitution, then it establishes finally, so far as that State is concerned, that a New York tax statute which does not apportion the burden equally among the owners of estates sought to be taxed is unconstitutional if regarded as an exercise of the general taxing power of the State. And, if this Court shall now hold that this tax cannot be upheld as a succession tax, it will follow that it cannot be upheld as an exercise of the State's general taxing power.

But the whole decision of the Court of Appeals in the *Pell* case makes it unnecessary to apply to the Transfer Tax Act the constitutional limitations which would be applicable to a statute which exercised the general taxing power of the State, for the Court of Appeals there reversed the Appellate Division on the express ground that the act could not be regarded as an exercise of the general taxing power.

The statute considered in the *Pell* case was an amendment passed in 1899 to the Transfer Tax law. It related to the imposition of a tax on estates in remainder, but in deciding as to the intention of the Legislature the Court of Appeals considered that amendment as a part of the general Transfer Tax Act which it was intended to amend, and the Court

reached its conclusion by construing the law as a whole. The decision in that case necessarily applies to the amendment of 1897, which was a part of the Transfer Tax law before the *Pell* case arose. The same view was again declared in this case (p. 131).

The issue in the present case is, therefore, narrowed down to the question whether the Amendment of 1897 can be upheld as a succession tax (*i. e.*, an exercise of the power of the State with respect to the disposition of property left by the death of its owner), for it must stand or fall as a succession tax.

FOURTH POINT.

There has been no succession to the remainders originally transferred by the deeds of 1844, 1848 and 1849 which would permit the imposition of a succession tax.

As already discussed, the only succession which can be the basis of a succession tax is that which is caused by the *death* of an *owner* of property. The death of William B. Astor in 1875 has nothing to do with the transfer of these remainders, for he had, thirty-five or more years before, conveyed the remainders by deed.

The death of Mrs. Delano cannot be the basis of a taxable succession, because she did not own the remainders.

After her death the remaindermen went into *possession*, but her death did not give them *title*. Possession is sometimes an incident to ownership, but title is ownership itself, and to treat Mrs. Delano's death as the basis of a taxable suc-

cession to these remainders is simply to disregard a fundamental distinction.

This distinction is well illustrated by *Matter of Seaman* (147 N. Y., 69). There the New York Transfer Tax Act had been passed after *title* had vested in certain remaindermen, but before the precedent life estate terminated, and therefore before they were entitled to *possession*. And it was held that no tax could be imposed.

The law with respect to the execution of powers is merely a branch of the law of principal and agent. The donee of the power may, to careless observers, appear to exercise some of the powers of disposition which the owner might exercise, but the donee of the power is not the owner, and to treat him as owner can only lead to confusion and complications.

Mrs. Delano's powers with respect to these remainders were strictly limited. If she had not exercised the powers, the remainders would have gone to her heirs, and the powers merely enabled her to appoint the remainders among those heirs. She could not have sold the remainders in her lifetime, and if she had died leaving debts her creditors could not have reached them. If she had exercised these powers by an instrument entirely separate from her will, the appointees would have held title precisely as they do to-day, and if the statute of wills and the statute of distributions had both been revoked before she died, these remainders would nevertheless have passed, under the original deeds, to the persons designated by her in an instrument executed according to the requirements of those original deeds.

Heath v. *Withington* (60 Mass., 497).

To treat these remainders as *practically* the property of Mrs. Delano is simply to depart from the legal principles which regulate the relations be-

tween principal and agent, and which preserve *ownership* in the principal while recognizing that the agent has the *powers* which have been conferred upon him.

There can be powers which make the property involved practically the property of the donee, but those must give the donee the unlimited power of appointment. Such powers the law treats as tantamount to ownership, at least so far as the rights of creditors are concerned.

Here the powers are in trust and were limited to be exercised only in favor of certain descendants of the creator of the power.

The distinctions here contended for have been recognized by the Court of Appeals in a recent case which has arisen under this Amendment of 1907.

Matter of Lansing, 182 N. Y., 238.

A testator, who died in 1869, had left a portion of his estate in trust for his daughter, Mrs. Lansing, with remainder to her heirs at law, but subject to a power which he gave to her to dispose of the remainder among her heirs or collateral relatives. Mrs. Lansing died, leaving as her only heir her daughter, Mrs. McVickar, and leaving a will by which she appears to have made certain devises or bequests, or both, to Mrs. McVickar, and by which she also appointed to Mrs. McVickar the same property which the latter would have taken under her grandfather's will if her mother had made no appointment.

The Court of Appeals, in holding that Mrs. McVickar might elect to take directly under her grandfather's will, and not by appointment, discussed the appointment as follows:

> "Mrs. McVickar, by accepting under her "mother's will property which belonged to

> "her mother at the time of her death, did not "accept the title tendered by the appoint- "ment, although both gift and appointment "were made by the same instrument. She "could claim as the devisee of her mother "and disclaim as her appointee, because *a "gift and an appointment are wholly unlike "in character and substance. The gift was "confined to property of the mother, while "the appointment was confined to property "which she never owned* and which vested in "the daughter through the will of her grand- "father." (Italics ours.)
>
> *Matter of Lansing*, 182 N. Y., 238, 245.

A practical example of the impropriety of treating those remainders as though they had belonged to Mrs. Delano and as though they had been devised or bequeathed by her, will appear by the amount of the tax assessed below.

For many years there was in New York State no succession tax on direct descendants, and when a tax was imposed on them it was, and now is, at the lowest rate (1 per cent.), while the tax on devises and bequests to collaterals is at the highest rate (5 per cent.).

The plaintiffs in error are all direct descendants of William B. Astor. They belong to the class to whom he intended the remainders created by the deeds should ultimately pass, and legally they take their estates from him as though the appointment were a part of the original deed (4 Kent's Com., 337).

But Mrs. Delano, the agent of William B. Astor, is a collateral relative of all the plaintiffs in error, and this device of treating the remainders "as though" they belonged to her not only subjects the remainders to a succession tax, but to a tax at the highest rate, as though the former owner of the remainders had been a collateral relative, although in fact he was a direct ancestor.

FIFTH POINT.

The instrument by which Mrs. Delano exercised these powers of appointment created by deed was not a "will" in so far as it exercised those powers.

I.

THE FORM OF THE INSTRUMENT.

The instrument by which Mrs. Delano exercised these powers is distinctly and formally subdivided. By the first and second articles she appoints these remainders which did not belong to her, but which as the agent of her father she had power to appoint (pp. 75 to 78). By the third and fourth articles she devises and bequeathes her own property (pp. 78 to 80). The latter articles legally constitute her *will*. The codicil (pp. 80 to 82) provides that in case certain appointments proved invalid the amount intended to be appointed should be made up out of her individual estate. Its only function, therefore, is to dispose of her individual property, and it is legally only a codicil to her "Will" and does not affect the appointments.

To speak accurately and legally, the combined instrument, which has been called a "Will" below, should be called an "Instrument of Appointment *and* Will," and Mrs. Delano in the caption of the instrument (p. 75) refers to its dual nature, and to the creation of the powers, and in the body of the instrument she makes a careful and formal distinction between the two parts of the instrument. For the sake of brevity, it has sometimes been called a "will."

A more unfortunate place for abbreviation could hardly be found. The portion of the instrument which was a will was the act of an *owner* and disposed of property which Mrs. Delano *had owned,* and which, on her death, must necessarily pass through that legal machinery which the State had provided for regulating succession to property where its *owner* has *died.*

On the other hand, the portion of the instrument which exercised these powers was the act of an *agent,* and, under a delegated power, it appointed property which she did not own and which was beyond the reach of the power which the State has to regulate the disposition of property left by the death of its former *owner.* In one case the power of the State to impose a succession tax had been called into being; in the other case it had not. In one case Mrs. Delano was availing herself of a privilege granted by the State; in the other she was exercising a contract right.

This Court has held that this tax "is in reality "a limitation upon the power of a testator to be-"queath his property to whom he pleases" *(U. S.* v. *Perkins,* 163 U. S., 625, 628). How can such limitation affect the *appointment* of these remainders? Mrs. Delano in appointing them was not bequeathing or devising anything and the property appointed was not her property.

To disregard these distinctions and to treat the whole instrument as a will is to disregard one of the distinctions on which this case turns. This unfortunate brevity also opens the door to misapprehension, for there may be a disposition to claim that because these remainders are mentioned in a "will," it follows that, in some way, they were a part of the estate of a deceased person. This was not the fact.

As a matter of convenience Mrs. Delano incorporated in the same instrument which also con-

tained her will certain provisions exercising these powers, and this was, no doubt, done because the deeds creating those powers had provided that the powers should be exercised by instruments *"exe-"cuted like* a will."

The clauses by which the powers were exercised could properly have been put in a separate instrument, and, if such an instrument had been executed before the requisite number of witnesses, it need not have been in the form of a will. It was an instrument by which a *third party* divided up the property of certain *other living* persons among themselves.

This property, that is, the remainders, had belonged in equal shares to all of the members of a certain class, but the original grantor had given Mrs. Delano power to take portions of the remainder from certain of the class and give it to certain others of the class.

It so happened that she herself had been given a life interest in the same lands and funds after which life interest these remainders were created, but the existence of that life estate in her does not make any difference so far as the legal questions affecting these remainders are concerned, and the same question would be presented if the life estate had been given to some other person and Mrs. Delano had been empowered to appoint the remainders after that life estate among a class. The remainder was no more hers in the present case than it would have been had she been given no life estate in the lands and funds, and those remainders no more passed under her "will" *as a will* in the present case than they would have passed had the life estate been given to some other person.

II.

THE LAW OF NEW YORK STATE, AS DECLARED BY CHANCELLOR WALWORTH IN 1845, CONTEMPORANEOUSLY WITH THE EXECUTION OF THESE DEEDS, WAS, THAT AN INSTRUMENT EXERCISING A POWER CREATED BY SUCH A SETTLEMENT IS NOT A WILL, AND DOES NOT OPERATE AS SUCH.

> ". . . . The testamentary instrument "which the wife executes, under a power of "appointment, either as to her real or per- "sonal estate, is not strictly a will, nor "does it operate as such in the proper legal "sense of the term. But it operates as an "appointment; and the devisee or legatee "takes the property by the force of the pow- "er." . . . .
>
> *Strong* v. *Wilkin*, 1 Barb. Chan., 9, 13.

The same principle has been recognized by decisions in Massachusetts, as for example, in *Heath* v. *Withington* (60 Mass., 497). There a marriage settlement had been made reserving to the wife a power to appoint "to such person or persons as she shall "in writing appoint to receive the same." She exercised that power by an instrument in the form of a will which was made at a time when the Massachusetts statute did not permit the making of a will by a married woman. The appointment was nevertheless held to be good, the Court, by Mr. Justice Metcalf, holding (p. 500):

> ". . . . the instrument before us is not "to have the effect of a will, but is an ap- "pointment in writing, to guide the conduct "of the trustee. Its effect, if proved and al- "lowed, is not that of a will in common cases. "The appointees will take, not as legatees of "Mrs. Heath, but as grantees or donees of the "trustee in whom the property was vested by "the indenture."

And again, in *Sewall* v. *Wilmer* (132 Mass., 131), where a testator domiciled in Massachusetts left real and personal property to trustees in trust for his daughter for life, and on her death to convey to such persons as the daughter should appoint,

> ". . . . by any deed or writing to be by "her signed, sealed and delivered in the pres- "ence of three or more credible witnesses, or "by her last will and testament in writing, or "by any writing purporting to be her last "will and testament, to be by her duly ex- "ecuted in the presence of a like number of "credible witnesses," . . . .

The daughter, whose domicile, at the time of her death, was Maryland, left an instrument which was proved as a will. It contained provisions which, under the law of Maryland, did not exercise the power, but which, under the law of Massachusetts, were legally sufficient to exercise the power. It was held that the power was properly exercised, although the instrument executed by the daughter was not valid as an exercise of the power in the State of the daughter's domicile. Mr. Justice Horace Gray (then Chief Justice of the Supreme Judicial Court of Massachusetts), in rendering the opinion, said:

> ". . . . But the property of which "Mrs. Wilmer (the daughter) has a power of "appointment is not her property, but the "property of her father; and the instrument "executed by her takes effect, not as a dispo- "sition of her own property, but as an ap- "pointment of property of her father under "the power conferred upon her by his "will." . . . .
>
> *Sewell* v. *Wilmer*, 132 Mass., 131, 136.

III.

THE POWERS CREATED BY THE DEEDS WERE GIVEN TO A MARRIED WOMAN.

The deed of 1844 was made by way of marriage settlement for Mrs. Delano (p. 89), and took effect only upon her marriage. The later deeds referred to her as having married (pp. 84, 87 and 93).

The powers of appointment given by those deeds were, therefore, given to a married woman.

If New York State had in 1844 and 1848 permitted married women to make wills, the instrument by which Mrs. Delano exercised these powers would still not have been a "will." But the fact that she *could not make a will* when these powers were created, and that eminent counsel prepared the deeds with this in mind emphasizes the fact that the instrument by which the powers were to be exercised, was not a will made by permission of the State, but an instrument of appointment made under the terms of the contract, that is, of the deed.

IV.

WHEN THE DEEDS OF 1844 AND 1848 WERE MADE A MARRIED WOMAN WAS NOT PERMITTED TO MAKE A WILL OF REAL OR PERSONAL PROPERTY.

As to real estate,

II New York Revised Statutes, 56, Sec., 1.

As to personal property,

II N. Y. Revised Statutes, 60, Sec. 21.

V.

THE DEEDS OF 1844, 1848 AND 1849 WERE EVIDENTLY PREPARED WITH CARE AND IN RECOGNITION OF THE NEW YORK REVISED STATUTES AND OF THE PRINCIPLE REFERRED TO IN THE CASES CITED, FOR NONE OF THE DEEDS REQUIRED THE POWER TO BE EXERCISED BY WILL.

The power created by the deed of 1844 is directed to be exercised "by instrument in its nature testamentary, to be acknowledged by her as a deed and in the presence of two witnesses or published by her as a will" (p. 91).

The power created by the deed of 1848 is directed to be exercised "by instrument in its nature testamentary to be acknowledged by her as a deed in the presence of two witnesses or published by her as a will" (p. 85).

The power created by the deed of 1849 is directed to be exercised "by any instrument executed duly as a will of personal estate" (p. 88).

In all of these cases the reference to a "will" is merely to indicate the manner in which the instrument of appointment is to be executed, and in two cases permission is given to exercise the power by deed. The directions go to the manner of execution and not the character of the instrument by which the power is to be exercised. They do not affect its essential character.

VI.

COULD MRS. DELANO HAVE EXERCISED THIS POWER BEFORE 1848?

The argument of this fifth point can be tested effectually by inquiring whether, in the years 1845, 1846 and 1847, before the Married Women's Acts of 1848 and 1849, which gave to married women the

power to make wills, were passed, Mrs. Delano could have exercised the power of appointment given her by the deed of 1844.

Could she, say in 1847, have exercised that power? She could certainly, in 1847, have made such an instrument of appointment as was required by the deed of 1844, that is, an "instrument in its nature testamentary (*i. e.*, an instrument to take effect on her death and revocable by her during life), to be acknowledged by her as a deed and in the presence of two witnesses or published by her as a will" (p. 91).

In making such an instrument she would not be making her "will," for she would not be devising or bequeathing property of which she was seized or possessed. But she would be acting as the agent of her father, William B. Astor, in reapportioning among a certain class of her relatives certain remainders which were not her property.

Just such a situation was presented to the Court in *Heath* v. *Withington* (60 Mass., 497), already referred to. There a power of appointment was exercised by a *married woman* by an instrument in the form of a will but made at a time when under State statutes married women were prohibited from making "wills," yet the Court held the appointment to be valid because the instrument of appointment was not a "will" in its legal effect.

It cannot be disputed that Mrs. Delano had, in 1847, the right to exercise the power of appointment. But where did she get that right? Not from the State, which forbade her making a will, but under the terms of a formal written contract between living persons, *i. e.*, the deed of 1844. And if she had, in 1847, that right under the terms of a contract, and if that right was to exercise the power as to all the remainder and not as to only 95 per cent. of it, then it follows that the right was hers

under contract in 1847 and cannot be impaired by subsequent statute.

The principle that a power of appointment is exercised (even when exercised by an instrument in the form of a will) under a contract right and not under a privilege granted by the State has been repeatedly stated in the series of Massachusetts cases on this subject. Thus, in *Parker* v. *Parker* (11 Cushing, 519, 522), the Court held of such an appointment:

> ". . . . It derives its efficacy wholly "from the authority to make the devise or "disposition of the estate conferred on the "married woman by some independent con- "tract or indenture, adapted to effect this "object. If no such authority is vested in "the wife, and it be the naked case of a mar- "ried woman making a will of her real es- "tate, the will is not authorized by "law," . . . .

And of such an appointment the Court again held, in *Ela* v. *Edwards* (16 Gray, 91, 100):

> ". . . . The authority to make such "disposition of her estate does not arise "under our statute of wills, but is the result "of articles of agreement entered into by the "parties before marriage."

VII.

THE ARGUMENT OF THIS FIFTH POINT CAN BE TESTED BY A RULE WHICH HAS BEEN LAID DOWN BY THE NEW YORK COURT OF APPEALS SINCE IT PASSED ON THIS CASE.

The Court of Appeals stated the grounds of its decision in this case as follows:

> "The statute, as we read it, does not at- "tempt to impose a tax upon property, but "upon the exercise of a power of appoint-

"ment (p. 131). . . . . The privilege "of making a will is not a natural or inher- "ent right, but one which the state can grant "or withhold in its discretion. If granted, it "may be upon such conditions and with such "limitations as the legislature sees fit to "create" (p. 132).

". . . . If the power had been exer- "cised by deed, a different question would "have arisen, but it was exercised by will "and owing to the full and complete "control by the legislature of the making, "the form and the substance of wills, it can "impose a charge or tax for doing anything "by will" (p. 133).

In a later transfer tax case (*Matter of Lansing*, 182 N. Y., 238) the Court of Appeals had again to consider this Amendment of 1897, and after discussing the nature of the transfer tax, stated "the "only theory on which the tax can be upheld," and then proceeded to apply an obvious test to discover whether, on the theory so announced, the tax could be imposed in that case.

The theory was stated and the test applied thus:

". . . . The theory of a transfer tax "is that it is a tax on the right accorded to "take under a will or to succeed in case of "intestacy which, it is said in the decisions, "are privileges that may be accorded or de- "nied by the state. (*Matter of Dows*, 167 "N. Y., 227; *Magoun* v. *Illinois Trust & Sav. "Bank*, 170 U. S., 283.) This is the only "theory on which the tax can be up- "held; for it is imposed upon United "States securities on which, of course, the "state cannot impose any property tax. Now, "suppose that the state at the time it im- "posed the inheritance tax instead of enact- "ing that statute had forbidden the making "of wills and succession in case of intestacy, "itself taking all the property that a dece- "dent might leave at the time of his death, "such a statute could have no possible effect

> "on Mrs. McVickar's [the appointee's] "rights, for those rights had been acquired "long before. Therefore, what privilege did "she get at that time from the State for "which it can charge or impose a tax?"
>
> *Matter of Lansing*, 182 N. Y., 238, 248.

Let us apply the same test to this case:

> "Suppose that the State at the time it im- "posed the inheritance tax instead of enact- "ing that statute had forbidden the making "of wills and succession in case of intestacy, "itself taking all the property that a dece- "dent might leave at the time of his "death, ..."

what effect would such a statute have had on the exercise of the powers created by these deeds? Obviously, no effect.

The powers were to be exercised by "instruments" executed as wills were executed or acknowledged as deeds. This merely regulated the manner by which the "instruments" were to be attested, but did not determine their nature. The decisions already referred to, particularly those of the Massachusetts courts, have so held.

Such instruments were made in fulfilment of an *agency*, and were not the deeds or wills of the donee of the power, for the reason that the donee of the power did not own the property to which they related. If, before Mrs. Delano's death, New York State had passed a statute repealing the Statute of Wills and the intestate laws, such a statute would not have affected these remainders, for Mrs. Delano never owned them.

More than this, the right of Mrs. Delano to exercise these powers and the right of the appellants to have them exercised "had been acquired long before." Therefore, what privilege did they get "at "that time from the State for which it can charge "or impose a tax?"

There was no real privilege of making a real will involved here, and when the New York Legislature passed the Statute of 1897 taxing appointments made by deeds *inter vivos* it diminished and impaired the contract rights which arose in 1844, 1848 and 1849, when these powers were created.

VIII.

THE ARGUMENT OF THIS FIFTH POINT CAN FURTHER BE TESTED BY CONSIDERING THE POWERS OF THE STATE WITH RESPECT TO THE DISPOSITION OF PRIVATE PROPERTY.

The State of New York not only *did not* give Mrs. Delano the privilege of exercising these powers by will, it *could not* give that privilege.

The reason why "the right accorded to take under "a will or to succeed in cases of intestacy . . . . "are privileges that may be accorded or denied by "the state" (*Matter of Lansing*, 182 N. Y., 238, 248) is because it is within the power of the State to decide what disposition shall be made of property in the State which is left without an owner because the former owner has died. This power of the State only arises where the *owner* of the property has *died*, and, therefore, to permit the State to interfere with the disposition of property two conditions must be met: (1) previous ownership, and, (2) death.

Neither condition was met in this case.

Mrs. Delano did not own these remainders. Her only relation to these remainders was that of an agent who was given certain powers over property not her own. The State can give to the owners of property in the State the privilege of making wills disposing of their property, but it cannot give them the privilege of making wills disposing of other people's property. It cannot give to an agent the privi-

lege of disposing by will of the property of his principal.

These propositions are simple and self-evident, and from them it follows that the State of New York had no more power to give Mrs. Delano the privilege of *making a will* disposing of these remainders than it had to give such a privilege to a total stranger.

The owners of the remainders (that is, the remaindermen designated by the deeds) had not died. The power which the State has over the property of a deceased person has never been called into being so far as these remainders are concerned, and the State therefore cannot give the privilege of disposing of such property by *will*.

The only way in which Mrs. Delano could have obtained the power to appoint these remainders was by contract, for the State *could not* give her that power.

It is making a self-evident statement to say that a State cannot give to one citizen the privilege of disposing by will of the property of another citizen. The moment, therefore, it is recognized that these remainders were not the property of Mrs. Delano, it must also be recognized that in appointing the remainders she cannot have exercised a privilege given to her by the State, for the State has no power to give to one person such a privilege with respect to the property of another.

If the powers had been created by *will*, and if a succession tax had been legally imposed on the transfer caused by that will, an entirely different case would have been presented. The exercise of the powers would then be legally a part of the will, and, so, legally a part of the original privilege. And the State could revoke that privilege in part or impose a charge in return for that privilege, and it could do this when the original will took effect or

when the instrument exercising the power took effect.

SIXTH POINT.

The imposition of a tax under the Amendment of 1897 will deprive the plaintiffs in error of property without due process of law.

I.

THE LEGISLATURE HAS BASED THIS EXACTION ON AN HYPOTHESIS AS TO THE FACTS, WHICH IT DELIBERATELY RECOGNIZES TO BE A FALSE HYPOTHESIS.

As already discussed (Third Point), the New York Court of Appeals has held that, in passing the Transfer Tax Act and its amendments, the New York Legislature did not exercise the general taxing power of the State, but intended to pass a succession tax.

In this case there has been no succession, and there can be no succession tax here unless it is within the power of the Legislature to avoid constitutional limitations by "deeming" the facts to be what they are not.

The Legislature in framing the Amendment of 1897 adopted phraseology broad enough to include the case of powers created by *deed*. The framers of the act accordingly recognized that when applied to appointments under powers created by deed the act would reach cases where there was not, in fact, any succession, and to meet such cases —and this is one of them—the Legislature provided that—

"whenever any person or corporation "shall exercise a power of appointment de- "rived from any disposition of property "made either before or after the passage of "this act, such appointment when made "*shall be deemed* a transfer taxable under "the provisions of this act in the same man- "ner *as though* the property to which such "appointment relates *belonged absolutely* to "the donee of such power and had been *be- "queathed or devised* by such donee by "*will.*"

The words "a transfer taxable under the provisions of this Act" are defined by the section in the same statute relating to definitions (Chap. 908, Laws of 1896, Secs. 220 and 242) as meaning dispositions by will, by the intestate laws, or by deed or gift, to take effect on the death of the grantor. All of such transfers are in fact successions; that is, they depend on the *death* of the previous *owner* of the property.

But when applied to this case, where the power has been created by deed *inter viros,* and taking effect on delivery and not on the death of the grantor, the statute ignores the facts at every important point. It provides that the exercise of the power

(*a*) *"shall be deemed"* a succession caused by *death,* although that is not the fact;

(*b*) *"as though* the property to which "such appointment relates belonged abso- "lutely to the donee of such power," although it did not belong to the donee;

(*c*) "and had been bequeathed or devised "by such donee by will," although it had not been bequeathed or devised by the donee, and although the instrument by which the power is exercised, in so far as it does exercise the power, is not a will.

States have repeatedly attempted to treat an appointment as a succession for the purpose of collecting a succession tax, but such attempts have uniformly failed for the reason that an appointment is not legally a succession because the appointed property does not belong to the donee of the power.

A leading decision on this subject, and one which was based on the same principles which have here been discussed, is *Emmons* v. *Shaw,* 171 Mass., 410. And to the same effect are:

Commonwealth v. *Duffield,* 12 Penn. St., 277.

Commonwealth v. *Williams,* 13 Penn. St., 29.

Matter of Stewart, 131 N. Y., 274, 281.

Matter of Harbeck, 161 N. Y., 211.

By the Amendment of 1897 the New York Legislature attempted to change the law on this subject by expressly imposing a succession tax at the time when a power of appointment should be exercised. This it had power to do where there had *in fact* been a succession; that is, where the power had been *created* by *will,* or by deed taking effect at death, and the power had thus arisen on the *death* of the former *owner,* for, so long as the property was going through the legal machinery of succession set in motion by the death of the owner, a succession tax could at any time be imposed (*Orr* v. *Gilman,* 183 U. S., 278).

But here, where there had not in fact been any succession, the Legislature sought to meet that fundamental difficulty by enacting that *the facts* should "be deemed" to be what they were not, and this for the purpose of avoiding constitutional limitations on the legislative power to take private property.

This is not a case where facts have arisen in the course of applying a statute which may not have been in the mind of the Legislature when the statute was passed. In passing the Amendment of 1897 the Legislature distinctly recognized that it was imposing a tax by means of a hypothesis, and it distinctly recognized that the hypothesis was false. For, when it provided that an appointment should be deemed a transfer under the provisions of the act,

> "in the same manner as though the prop-
> "erty to which such appointment relates be-
> "longed absolutely to the donee of such
> "power and had been bequeathed or devised
> "by such donee by will,"

it recognized that the property did not belong to the donee and that the donee had not bequeathed or devised it by will.

This case, therefore, raises directly the question, whether a Legislature may *deliberately* take the property of a citizen by means of a statute which requires that the facts be considered to be what they are not, and which requires the property to be treated as belonging to a person who does not own it.

This method of legislating by means of an hypothesis recognized to be false would afford an easy method of evading any of the provisions of the United States Constitution.

For example, if a State should now pass a law making rebating a felony, and should provide that such law *"shall be deemed"* to have been passed in the year 1850 and shall apply to all cases and be in force *"in the same manner as though"* it had become a law in 1850, would such a device deprive citizens of the protection of the provision of the Constitution prohibiting an *ex post facto* law?

In fact, what security can ever be afforded to a

citizen by the United States Constitution if it is due process of law for a State Legislature to enact that the fact *"shall be deemed"* to be what it is not and then to legislate against the citizen "in the same manner as though" the fact was what it is not?

It can hardly be necessary to argue against the illegality of such a device for evading the Constitution, for if the device is legal it would require but little ingenuity in the use of false hypothesis to evade almost any of the provisions of the Constitution which limit legislative power. The Constitution could then be nullified by State Legislatures at will.

The difficulty which the New York Legislature here sought to overcome was, that Mrs. Delano did not own the property which she appointed under the power, and as the power had been brought into effect by the delivery of a deed and not by the death of an owner, the State had no jurisdiction to impose a succession tax. And this difficulty it sought to overcome by declaring that the appointment should be taxed as though the property belonged to Mrs. Delano.

Such a device for evading constitutional provisions has been expressly condemned by this Court. In *St. Louis* v. *Ferry Co.* (11 Wall., 423, 430), Mr. Justice Swayne, in stating the opinion of the Court, held, in language which was afterward quoted with approval by Mr. Justice Field in stating the opinion of the Court in *Gloucester Ferry Co.* v. *Pennsylvania* (114 U. S., 196, 208):

> "Where there is jurisdiction neither as to "person nor property, the imposition of a tax "would be *ultra vires* and void. If the Legis- "lature of a State should enact that the citi- "zens or property of another State or coun- "try should be taxed in the same manner as "the persons and property within its own

"limits and subject to its authority, or in "any other manner whatsoever, such a law "would be as much a nullity as if in conflict "with the most explicit constitutional in- "hibition. Jurisdiction is as necessary to a "valid Legislature as to a valid judicial "action."

II.

THIS EXACTION IS BASED ON A LEGISLATIVE TRANSFER OF THESE REMAINDERS FROM THE TRUE OWNER TO ONE WHO WAS NOT THE OWNER.

This exaction has been made by the State of New York by first making these remainders the property of Mrs. Delano and then by proceeding to take five per cent. of them, as though they were her property, and this preliminary transfer of the remainders from the true owners to Mrs. Delano, who was not the owner, has been effected by means of a legislative enactment.

But the *Legislature* has no jurisdiction by which it can decide that property shall be treated as though it belonged to one who does not own it, and, if it had, the parties in interest have had no notice or opportunity to be heard prior to such decree. Where there is due process of law there must be jurisdiction, notice and an opportunity to be heard.

Pennoyer v. *Neff*, 95 U. S., 714, 733.
Scott v. *McNeal*, 154 U. S., 34, 46.

Mr. Justice Field, in a dissenting opinion, in a case in which Mr. Justice Strong and Mr. Justice Bradley also dissented, has discussed the circumstances under which an act of the Legislature became really a judicial act.

". . . . Wherever an act undertakes "to determine a question of right or obliga- "tion, or of property, as the foundation upon

"which it proceeds, such act is to that extent "a judicial one, and not the proper exercise "of legislative functions." . . . .

Sinking Fund Cases (*Union Pacific R. R.* v. *U. S.*), 99 U. S., 700, 761.

The parties here in interest had no day in court or hearing when this property of theirs was declared by the Legislature to be the property of Mrs. Delano as a preliminary step to an exaction which should deplete it.

Of such an act Mr. Justice Story said, in *Wilkinson* v. *Leland*, 2 Peters, 627, 658:

". . . . We know of no case, in which "a legislative act to transfer the property of "A to B without his consent, has ever been "held a constitutional exercise of legislative "power in any state in the Union. On the "contrary, it has been consistently resisted "as inconsistent with just principles, by "every judicial tribunal in which it has been "attempted to be enforced." . . .

SEVENTH POINT.

The Amendment of 1897 in imposing a succession tax on the property of the plaintiffs in error impaired the obligation of a contract.

The claims made under this point will be found to be distinct from those which have been urged above with respect to constitutional limitations on the taxing power. The plaintiffs in error here rely on Section 10 of Article I of the Constitution, which prohibits the States, by the exercise of any or all of their powers, from impairing the obligation of a contract.

In many of the cases which have come before this Court under the clause of the Constitution prohibiting a State from passing a law impairing the obligation of contracts, one of the main questions has been as to the existence of anything which could legally be called a contract. No such complication exists here. The plaintiffs in error point to the definite provisions of deeds executed by their ancestor for their benefit forty years before there was any succession tax in New York, and they ask that the State shall not be allowed to alter the terms of those contracts.

I.

Status of the plaintiffs in error as declared by the New York courts.

Each of the remaindermen named in the original deeds took a vested remainder subject to being divested only by the exercise of the power in favor of some other member of the class.

> ". . . . It appears to be well settled, "that until the execution of the "power, the remainders or limitations "over take effect the same as if "no such power existed, or as in the case "of default of execution of it. Cunningham "*v.* Moody, 1 Vesey Sen., 174; Doe *v.* Mar-"tin, 4 T. R., 39; Fearne, 227 to 232; Sugden "on Powers, 2, 5. The doctrine is very "clearly and succinctly stated by Fearne; "and Sugden, after discussing the cases on "the point, observes that the result of the "authorities is, that the power of appoint-"ment does not prevent the vesting of the "estates limited in default of appointment. "They are, of course subject to be divested "on the execution of the power."
>
> *Root* v. *Stuyvesant,* 18 Wend., 257, 267.

A transfer tax cannot constitutionally be imposed on a remainder which vested before the tax was created.

Matter of Pell, 171 N. Y., 48, 55.
Matter of Lansing, 182 N. Y., 238, 247 and 248.

The fact that the interests of any of the remaindermen under the deeds of 1844, 1848 and 1849 could be divested does not deprive them of constitutional protection. As the New York Court of Appeals said in an appointment case under the Amendment of 1897,

> ". . . . the interests of the devisee accrued on the death of the testator, and at that instant, and were immune from legislative attack whether contingent or vested." . . . .
>
> *Matter of Vanderbilt*, 172 N. Y., 69, 73.

II.

TO IMPOSE A TAX UNDER THE AMENDMENT OF 1897 WILL IMPAIR THE CONTRACTS CONTAINED IN THE DEEDS TO THE DETRIMENT OF ALL OF THOSE WHO TAKE ANY POWER OR ESTATE UNDER THOSE DEEDS.

(*a*) The Donee of the Power.

Under the deeds, Mrs. Delano had the power to appoint the entire remainder. The Amendment of 1897 changes this and gives her power to dispose of only 95 per cent. of the remainder, giving the other 5 per cent. to the State. This is simply the impairment of a contract.

If the State were here taxing property merely as property and by means of a property tax, a different question would be presented,

and even then the tax could not possibly be on Mrs. Delano or on her property, for it was not imposed till *after her death.*

Or if the State were here taxing a person a different question would be presented, and, even then, the tax could not possibly be on Mrs. Delano for it was not imposed till *after her death.*

But this is not a tax either on property or on a person, but a tax "on the transaction" or "transmission" (*Knowlton* v. *Moore,* 178 U. S., 41, 56); that is, a diminishing of the right of succession; (*U. S.* v. *Perkins,* 163 U. S., 625, 628), although there has in fact been no succession (that is, no change of ownership caused by death which could afford any legal basis for such an exaction). The State has merely attempted to take away the power to appoint 5 per cent. of these remainders, and to that extent has sought to impair these powers created more than half a century ago.

It does not answer this contention to say, that after these deeds were made New York State gave to Mrs. Delano the power to make a will. As already argued, the instrument by which she executed the powers was not legally a will. And if it had been *the State could not give her the power to dispose of these remainders by will because the remainders were not her property,* and it is obviously beyond the power of the State to give to any person the power to dispose by will of the property of others.

More than this, the State did not give a privilege in this case, for Mrs. Delano *already had* the power of appointment by deed without resorting to any permission by the State, and that fact made it unnecessary to inquire what powers any subsequent statutes gave or withheld. A statute which should give to a citizen a right of way across his own land would not affect his rights, for he would already have a right of way irrespective of any gift or privi-

lege from the State, and the pretended giving of such a "privilege" would not justify the State in thereafter treating the right of way of a citizen over his own land as a privilege.

The State of New York in this case did not give a privilege, and there is therefore no privilege which it can legally take back in whole or in part.

(*b*) The Whole Body of Remaindermen Designated by the Deeds.

Each of these original remaindermen took under the deeds a vested estate in his share of the remainder. That estate could only be divested on one contingency, and that is, by the exercise of the power in such a way as to exclude him.

The Amendment of 1897 in this case has impaired this contract right by making this vested estate subject to being divested in another way to the extent of 5 per cent., that is, by the taking of that 5 per cent. by the State.

Here again it is important to observe that this exaction of the State is not a tax on the appointee, for if the appointee were the United States of America the exaction would still be allowed (*United States* v. *Perkins,* 168 U. S., 625), although the State of New York has no power to tax the United States. And it is not a tax on the property appointed, for, if the property appointed had consisted of United States bonds, the exaction would still be allowed (*Plummer* v. *Coler,* 178 U. S., 115), although the State of New York has no power to tax United States bonds.

It is an exaction "on the transaction," and is a part of the transaction, and it alters the transaction in that the right of these original remaindermen is impaired to the extent of 5 per cent. If the transaction were not altered, the State could collect nothing here, for there is no tax on

either persons or on property, and it is only by altering the transaction and diverting the 5 per cent. into its own treasury that the State gets anything.

(*c*) The Appointees.

The appointees, as members of the general class of remaindermen designated by the original deeds, each took an aliquot part of the remainder under those original deeds. The title of each of them to such aliquot part has remained undisturbed from the time when it originally vested in them down to this day, and the exercise of the power of appointment had no effect whatever with respect to that part.

With respect to the other part of the remainder, each appointee when chosen by the donee of the power was entitled to have the power exercised in his favor in full. The Amendment of 1897 has prevented this, for it has altered the power so that it could only be exercised as to 95 per cent. of the property.

III.

THE APPLICATION OF THE UNITED STATES CONSTITUTION.

The clause of the United States Constitution providing that no State shall pass a law impairing the obligation of contracts applies to grants and other executed contracts, as well as to executory contracts.

Fletcher v. *Peck*, 6 Cranch, 87, 136

Even where the State has the power to tax, that does not give it the power to alter a contract.

". . . . *no State, by virtue of its taxing power, can say to a debtor, 'You need*

> *"'not pay to your creditor all of what you "'have promised to him. You may satisfy "'your duty to him by retaining a part for "'yourself, or for some municipality, or for "'the State Treasury.' . . . ."*
>
> *Murray* v. *Charleston,* 96 U. S., 432, 444.

> ". . . . What the legislature cannot "do directly, it cannot do indirectly, as the "Constitution guards as effectually against "insidious approaches as an open and direct "attack. Whenever a law deprives the "owner of the beneficial use and free enjoy- "ment of his property, or imposes restraints "upon such use and enjoyment, that ma- "terially affect its value, without legal "process or compensation, it deprives him of "his property within the meaning of the "Constitution." . . . .
>
> *Forster* v. *Scott,* 136 N. Y., 577, 584.

With respect to the character of the rights created by such deeds as these, and their immunity from legislative attack, it was held in New York in 1849, with respect to a trust deed made in 1846:

> ". . . . The plaintiff's grant to the "trustee is a contract, and even the possibili- "ties created by it, are perfect rights of prop- "erty, held under an executed contract. A "statute impairing this grant would be void, "by the provision in the constitution of the "United States against enactments by the "states impairing the obligation of con- "tracts."
>
> *Watson* v. *Bonney,* 2 Sandf., 405, 416.

Here again it is necessary to bear in mind that this exaction is not the imposition of a tax on persons or on property, but is the withholding by the State of five per cent. of property which would

otherwise have been appointed by Mrs. Delano among her heirs, and which the appointees would otherwise have been entitled to receive by the appointment; that is, it is an impairment to the extent of five per cent. of the contract rights created by the deeds made by William B. Astor.

The State of New York can undoubtedly tax the appointees as individuals if they are within its taxing jurisdiction and can tax their property as property, if that is within its jurisdiction, but it cannot impair a contract made with reference to that property half a century before the Amendment of 1897 was passed.

In the *Foreign-Held Bond Cases* this Court held, Mr. Justice Field writing the opinion of the Court:

> ". . . . The law which requires the "treasurer of the company to retain five per "cent. of the interest due to the non-resident "bondholder is not, therefore, a legiti- "mate exercise of the taxing power. It "is a law which interferes between the "company and the bondholder, and under "the pretense of levying a tax com- "mands the company to withhold a por- "tion of the stipulated interest and pay "it over to the State. It is a law which im- "pairs the obligation of the contract between "the parties. The obligation of a contract "depends upon its terms and the means "which the law in existence at the time af- "fords for its enforcement. A law which "alters the terms of a contract by imposing "new conditions, or dispensing with those "expressed, is a law which impairs its obli- "gation, for, as stated on another occasion, "such a law relieves the parties from the "moral duty of performing the original stip- "ulations of the contract, and it prevents "their legal enforcement." . . . .
>
> *State Tax on Foreign-Held Bonds*, 15 Wall., 300, 320.

Certain changes in the law as to the *situs* of personal property have occurred since the *Foreign-Held Bonds* case was decided, but those changes do not affect the decision of the Court on the inviolability of contracts.

The appointees in this case are not reached by this succession tax any more than the non-resident bondholders were reached by the tax in the case just cited. For, as has repeatedly been held, this tax is not imposed on them (*U. S.* v. *Perkins*, 163 U. S., 625), nor on their property. (*Plummer* v. *Coler*, 178 U. S., 115.)

In this case, just as in the Foreign-Held Bonds Case, a State statute which could not impose a tax on the person, attempted, nevertheless, to collect money for the State by interfering with the obligation by which property was to be transferred and the statute sought to do this by requiring a person, through whose hands the property passed, to take out five per cent. and turn it over to the State.

A part of the property originally transferred by the Deed of 1844 and all of the property originally transferred by the Deed of 1849 consisted of personal property. This was in the hands of Trustees during Mrs. Delano's lifetime and remained in their hands after her death. If, after her death, the appointees of the property had brought action against the Trustees to recover it, what defense could the Trustees have offered for turning over only ninety-five per cent. of the property instead of one hundred per cent.?

Obviously, the only defense they could have offered would have been to say, that by the Amendment of 1897 the Legislature had enacted that they need not pay over to the appointee all that the original deed required to be paid to him, but might satisfy their duty toward him by retaining a part for the State Treasury.

But how could such a power be claimed for a

State statute when this Court has expressly held that—

> ". . . . no State, by virtue of its taxing "power, can say to a debtor, 'You need not "'pay to your creditor all of what you have "'promised to him. You may satisfy your "'duty to him by retaining a part for your-"'self, or for some municipality, or for the "'State treasury.' . . . ."
>
> *Murray* v. *Charleston*, 96 U. S., 432, 444.

> "As the States are forbidden to pass any "laws impairing the obligation of contracts, "they are of course precluded from levying "any taxes which would have that effect."
>
> Cooley on Constitutional Limitations, 5th Ed., page 603.

This is not a case of the exercise of the State's general power of taxation, but if it were the State could not impair the obligation of a contract by a taxing statute (*State Bank of Ohio* v. *Knoop*, 16 How., 369) or even by a Constitution (*Dodge* v. *Woolsey*, 18 How., 331).

These plaintiffs in error do not claim that they, as individuals, or their properties as property, enjoy any exemption from taxation, but they claim that where no tax has been imposed either on them or on their property, contracts for their benefit shall not be impaired to obtain funds for public purposes.

If these powers had been created by will or by deed to take effect on the death of the grantor, then the whole contract would have depended on the *privilege* of succession granted by the State and would have been subject to any curtailment of that privilege by the State, or the imposition of any condition on the privilege by the State.

IV.

THIS COURT HAS DECIDED THAT SUCH CONTRACTS AS ARE HERE RELIED UPON BY THE PLAINTIFFS IN ERROR ARE PROTECTED AGAINST IMPAIRMENT BY THE UNITED STATES CONSTITUTION.

The essence of the decision in the Dartmouth College case (*Dartmouth College* v. *Woodward*, 4 Wheaton, 518) was, that a State Legislature could not impair *powers* given to Trustees of a college under its original charter. Much of the argument in that case was directed to the questions whether the original charter of Dartmouth College was such a contract as was protected by this clause of the Constitution, and whether the Trustees had such a *beneficial* interest in the maintenance of their powers as brought them within that constitutional protection.

Mr. Chief Justice Marshall, in discussing the contracts which were protected by this clause, found many reasons for extending that protection to such a grant of powers, as when he said (pp. 644-5):

> ". . . . The case being within the "words of the rule, must be within its opera- "tion likewise, unless there be something in "the literal construction so obviously ab- "surd, or mischievous, or repugnant to the "general spirit of the instrument, as to "justify those who expound the constitution "in making it an exception.
>
> "On what safe and intelligible ground can "this exception stand. There is no expres- "sion in the constitution, no sentiment de- "livered by its contemporaneous expound- "ers, which would justify us in making it. In "the absence of all authority of this kind, is "there, in the nature and reason of the case "itself, that which would sustain a construc- "tion of the constitution, not warranted by "its words? Are contracts of this descrip- "tion of a character to excite so little inter- "est, that we must exclude them from the

"provisions of the constitution, as being un-
"worthy of the attention of those who
"framed the instrument? Or does public
"policy so imperiously demand their re-
"maining exposed to legislative alteration,
"as to compel us, or rather permit us to say,
"that these words, which were introduced to
"give stability to contracts, and which in
"their plain import comprehend this con-
"tract, must yet be so construed, as to ex-
"clude it?"

Mr. Justice Story, in his opinion discussed the same subject at length and reached the same conclusion. He said (p. 697):

"In respect also to grants and contracts, it
"would be far too narrow a construction of
"the constitution, to limit the prohibitory
"clause to such only where the parties take
"for their own private benefit. A grant to a
"private trustee for the benefit of a particu-
"lar *cestui que trust*, or for any special, pri-
"vate or public charity, cannot be the less
"a contract because the trustee takes noth-
"ing for his own benefit." . . . .

And, in defining the scope of this clause of the Constitution, he proceeded *to refer to precisely such deeds of settlement as were made by William B. Astor, and held that such were protected by this clause of the Constitution* (pp. 698-699, 700):

"Another objection growing out of, and
"connected with that which we have been
"considering, is, that no grants are within
"the constitutional prohibition, except such
"as respect *property* in the strict sense of
"the term; that is to say, beneficial interests
"in lands, tenements, and hereditaments, &c.,
"&c., which may be sold by the grantees for
"their own benefit: and that grants of fran-
"chises, immunities, and authorities not val-
"uable to the parties, *as property*, are ex-
"cluded from its purview. No authority has
"been cited to sustain this distinction, and

"no reason is perceived to justify its adop-
"tion. There are many rights, franchises, and
"authorities which are valuable in contem-
"plation of law, where no beneficial interest
"can accrue to the possessor. A grant of the
"next presentation to a church, limited to
"the grantee alone, has been already men-
"tioned. *A power of appointment, reserved*
"in a marriage settlement, either to a party
"or a stranger, to appoint uses in favour of
"third persons, without compensation, is an-
"other instance. [Our italics.]" . . . .
"The truth, however, is, that all incorporeal
"hereditaments, whether they be immunities,
"dignities, offices, or franchises, or other
"rights, are deemed valuable in law. The
"owners have a legal estate and property in
"them, and legal remedies to support and re-
"cover them, in case of any injury, obstruc-
"tion or disseizin of them. Whenever they
"are the subjects of a contract or grant, they
"are just as much within the reach of the
"constitution as any other grant. Nor is
"there any solid reason why a contract for
"the exercise of a mere authority should not
"be just as much guarded as a contract for
"the use and dominion of property." . . . .

This is a direct expression of the opinion of this Court on the precise contract on which these plaintiffs in error rely.

Consider, again, the effect of the Amendment of 1897 on the rights of Mrs. Delano under the deeds. By no device of argument is it possible to maintain that the Amendment of 1897 imposed any tax *on Mrs. Delano* or on *her property*, for the Amendment did not purport to impose any tax until after her death. But the amendment did impair her power, for it only permitted her to appoint ninety-five per cent. of the remainder instead of one hundred per cent. This is a simple and clear case of impairment of contract in the primary significance of the word "impairment" and of the word "contract."

What case could call more strongly for the application of the words of Chief Justice Marshall, quoted above: "Is there in the nature and reason of the "case itself that which would sustain a construction "of the constitution not warranted by its words?"

There was enough doubt about the existence of a contract in the Dartmouth College case to lead to long argument, but there can be no doubt here as to the existence of a contract or as to its terms, and if the opinions filed in the Dartmouth College case are studied with the facts of this case in mind, it will be seen that the whole purpose of that decision was to protect contracts of this character.

The plaintiffs in error in relying on the Dartmouth College case can refer not only to the phraseology of the opinions where such contracts as these were expressly held to be protected, but also to the whole purpose of the decision, which was to protect against impairment powers which involved little, if any, benefit to the donees.

The statutes which have been passed in most of the States affecting the property rights of married women have done away with the necessity for marriage settlements in most cases, but when these deeds were made in the forties and when the Dartmouth College case was decided twenty-five years earlier, such settlements must have been common. So, it was quite natural that Mr. Justice Story should refer to the power of appointment conferred by such settlements as one of those contracts protected by this clause of the Constitution, and *it was equally to be expected that when William B. Astor made these deeds he should have relied upon the law as so declared.*

It does not answer this argument to claim that the State was here exercising its power to tax, for it has been specifically held in this case that the State was not exercising its general taxing power,

but was imposing a succession tax; that is, that it was altering the statutes relating to the succession to property (*United States* v. *Perkins*, 163 U. S., 625, 628) by appropriating a part of the property to the State's use, or by imposing a charge upon it as a condition to availing of the privilege granted by those statutes. This was not an exercise of the State's power to tax, but it was an exercise of the State's power to regulate succession, and, as has been repeatedly held in this Court and the New York Court of Appeals, the legality of such exactions is not to be tested by the principles regulating the power to tax, but by the principles governing the power to regulate succession.

If William B. Astor had created these powers by his will (or by deed *to take effect at his death*, which would legally have been the same thing. (*Minot* v. *Winthrop*, 162 Mass., 113), he would have subjected this property to the power of the State with respect to the making of wills and with respect to succession under wills, and if he had so subjected it to that power, then a succession tax could have been imposed at any point of the administration while the property was passing through the legal machinery so provided by the State.

But William B. Astor did not subject this property to that power of the State and he did not invoke that power for the purpose of transferring the property. He granted these remainders by deed taking effect on delivery, and if the State is now allowed, by a statute passed in 1897, to make a disposition of five per cent. of the property different from that disposition which was made by the grantor, then the contract evidenced by those deeds has been impaired.

It cannot be necessary to argue the proposition that all persons interested, or who may become interested, in the contracts contained in the deeds of

1844, 1848 and 1849 may invoke the protection of the Constitution against any impairment of those contracts. If this were not so, that inviolable quality which is given to contracts by the United States Constitution and which has contributed so greatly to the stability of our institutions, would die with the original parties to the contract.

EIGHTH POINT.

The Court of Appeals erred in holding that the Amendment of 1897 did not violate the Constitution of the United States.

This litigation has, from its inception, been based on the rights under the United States Constitution which the plaintiffs in error now assert. The Federal questions now raised were raised when testimony was first offered by the State before the tax appraiser (pp. 51, 71 and 72), then on appeal to the Surrogate (pp. 39 and 44), then on appeal to the Appellate Division (p. 4), then on appeal to the Court of Appeals (p. 108), and now in the assignments of error relied upon (pp. 113-119).

The Appellate Division considered and decided the case on constitutional grounds (pp. 137-140), and the Court of Appeals prefaced its opinion by the statement:

> "This appeal presents the question "whether the legislature is prohibited by "the Constitution, State or Federal, from "passing an act to impose a transfer tax "upon the exercise, by a last will and testa-"ment, of a power of appointment derived

> "from a deed, executed before the passage of "any statute imposing a tax upon the right "of succession to the property of a decedent" (p. 130).

Much might be said against the justice of diminishing by this exaction a gift to descendants which was made by deed more than half a century before the Amendment of 1897 was enacted, but that is a legislative question which the plaintiffs in error do not seek to discuss here. They have, throughout this case, pointed to definite and formal written contracts made by their ancestor for their benefit and they invoke specific constitutional guarantees to the citizen. They have consistently and insistently throughout this litigation rested their case on those constitutional guarantees.

When Mr. Carey made his application to have the proceeding to assess the tax dismissed as to him, the Surrogate, on learning that constitutional questions were involved, rendered a *pro forma* decision sustaining the tax, leaving the constitutional questions for the Appellate tribunals.

The five justices of the Appellate Division decided unanimously in favor of the points now urged by the plaintiffs in error (pp. 135-140). That Court briefly sums up its decision thus:

> "Having in mind, therefore, the fact that "the relator obtained his property rights by "deed and not by will and at a time when "there was no transfer tax or inheritance "tax law in existence and that he does not "obtain his estate by right of succession "under the will of Laura Astor Delano but "acquires it under the deeds of William B. "Astor which were in no sense testamentary "in character but were made many years "before the grantor's death, it follows, we "think, that the attempt of the legislature "to tax such property rights cannot succeed "and for the reasons that we have briefly "outlined, namely, that to uphold the tax

"here sought to be imposed under the guise "of taxing a right of succession, would in "fact be to sanction a tax upon property "and for that purpose to give to the amend- "ment of 1897 a retroactive effect which "would be violative of the Constitution" (p. 139).

In the Court of Appeals, the decision was rendered by a divided Court, two of the justices agreeing with the Appellate Division, and five deciding that a tax had been legally imposed.

In the Court of Appeals this case has necessarily turned on the interpretation of a particular State statute, the Amendment of 1897. Without that statute this exaction could not have been sanctioned, for that Court, in a decision announced shortly before the Amendment of 1897 took effect, held that no transfer tax had been imposed on appointments (*Matter of Harbeck*, 161 N. Y., 211).

In considering this case the Court of Appeals relied, therefore, on the provisions of the Amendment of 1897, not only for their conclusion, but for the method by which that conclusion was reached. They interpreted the statute as they discussed the case, and the discussion and interpretation are so interwoven as not to be separable. This is important, because that interpretation is not open to question here and the plaintiffs in error can now properly ask this Court to apply to the whole discussion and interpretation below the constitutional provisions which are invoked.

The basis of the opinion of the majority of the justices is shown by the following extracts from their opinion, and the expressions of opinion so quoted invite the comments which follow them.

I.

". . . . He [the appointee] is com-
"pelled to resort to the will in order to estab-
"lish his right, for the deed alone will not
"suffice. The privilege of making a will is
"not a natural or inherent right, but one
"which the state can grant or withhold in
"its discretion. If granted, it may be upon
"such conditions and with such limitations
"as the legislature sees fit to create" . . . .
(pp. 131-132).

The statement above quoted is the essence of the Court's decision. It is based on two propositions (the negative of which has been discussed in Points 5 and 7 above), viz.:

FIRST.—That in exercising these powers created by deed Mrs. Delano was making a "will" and

SECOND.—That in so exercising the powers she relied on a "privilege" granted by the State.

This privilege theory had not been discussed by counsel because the important deeds were made when New York State forbade the making of wills by a married woman. That fact was accordingly brought to the attention of the Court of Appeals by means of a motion for reargument, but the motion was denied (177 N. Y., 540).

II.

As a necessary corollary to the words last quoted from its opinion, the Court of Appeals went on to hold:

". . . . The legislature could provide
"that no power of appointment should be ex-
"ercised by will, or that it should be exer-
"cised only upon the payment of a gross or
"ratable sum for the privilege. It could
"exact this condition, independent of the

"date or origin of the power. All this neces-
"sarily flows from the absolute control by
"the legislature of the right to make a will"
(p. 132).

This is another way of saying that the Legislature could in 1897 legally expunge from the deeds made in 1844, 1848 and 1849 the provisions as to the power of appointment and could do this to the detriment of all who took any power or estate under those deeds. Is it then possible to say that the obligation of that contract has not been impaired?

And the decision cannot be upheld by relying on the general power of the State to tax, for the Court of Appeals held here, as it had held before, that the Legislature was not exercising the general taxing power of the State, but was imposing a succession tax.

It necessarily follows from the decision below that "the legislature could provide that no power "of appointment should be exercised by will," and those words used by the Court of Appeals *in this case* mean that the Court there intended to hold that the Legislature had power to prohibit altogether the exercise of the power created *by these deeds.*

How can that conclusion of the Court of Appeals possibly accord with the whole principle of the decision in the *Dartmouth College Case,* and particularly with the opinion of Mr. Justice Story, when he *picked out the powers given by marriage settlement deeds as example of powers which a State statute could not impair.*

III.

In answer to the objection to taxation by false hypothesis, the Court of Appeals said:

> ". . . . The statute applies to all "powers alike, without distinction on ac- "count of the method of creation or the date "of creation, and provides that the exercise "of the power shall be deemed a taxable "transfer of the property affected, the same "as if it had belonged absolutely to the donee "of the power and had been bequeathed or "devised by such donee" . . . . (p. 133).

This decision sustains, in the case of powers created by deed, the action of the Legislature in passing the Amendment of 1897 and holds that where powers of appointment have been created by deed *inter vivos* a State may take the property appointed under such powers by *deeming* the transfer to be one caused by death *as though* the property had belonged to one to whom it did not in fact belong.

But, obviously, this Court in enforcing the constitutional safeguards of the citizens must consider the facts and not some hypothesis, and particularly not an hypothesis which is recognized to be false. The ascertainment of facts is a judicial function which involves a hearing of the parties in interest. Here the Legislature proceeded without notice or hearing to decide that these remainders should be the property of a person who did not own them and on that foundation it has based this exaction.

NINTH POINT.

It should be held that by reason of the provisions of the Constitution of the United States no tax can be imposed or collected under Chapter 284 of the Laws of 1897 of the State of New York on any appointment made to any of the plaintiffs in error under powers created by deed, and the cause should be remanded to the Surrogate's Court of New York County for further proceedings in accordance with such determination.

LUCIUS H. BEERS,
Counsel for Plaintiffs in Error.

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Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 240.

WINTHROP ASTOR CHANLER, THOMAS T. SHERMAN, AS COMMITTEE FOR JOHN ARMSTRONG CHANLER ET AL.,
Plaintiffs-in-Error,

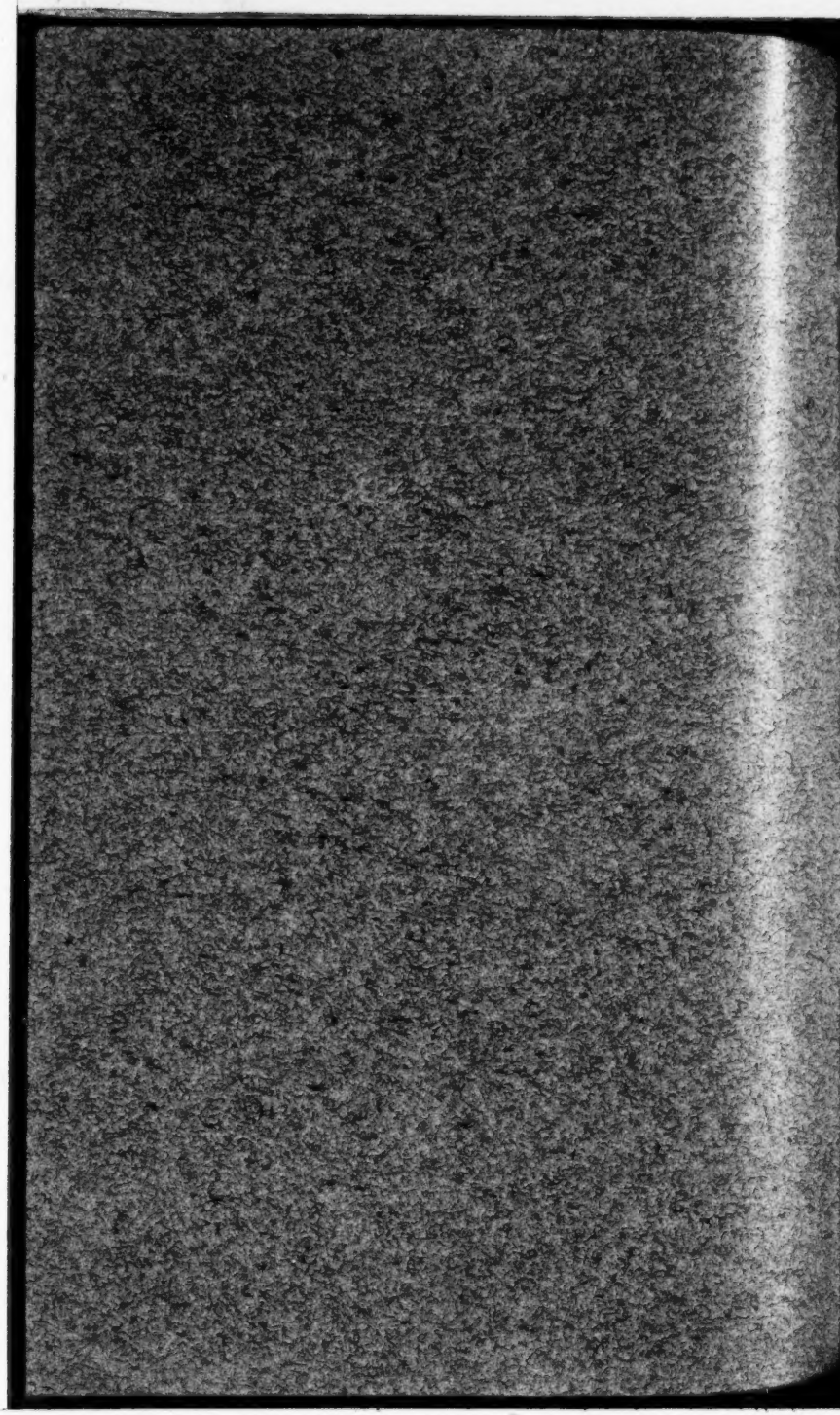
vs.

OTTO KELSEY, COMPTROLLER OF THE STATE OF NEW YORK,
Defendant-in-Error.

PETITION FOR RE-HEARING.

LUCIUS H. BEERS,
Counsel for Plaintiffs-in-Error.

EVENING POST JOB PRINTING OFFICE, NEW YORK.



EVENING POST JOB PRINTING OFFICE, NEW YORK

Supreme Court of the United States.

No. 240—OCTOBER TERM, 1906.

WINTHROP ASTOR CHANLER, THOMAS T. SHERMAN, as Committee for JOHN ARMSTRONG CHANLER *et al.*,
Plaintiffs in Error,

vs.

OTTO KELSEY, Comptroller of the State of New York,
Defendant in Error.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The plaintiffs in error in this cause respectfully present their petition for rehearing and submit the following reasons why their prayer should be granted:

I.—The question involved in this case was as to the constitutionality of the provisions of an amendment to the Transfer Tax Law of the State of New York (Chap. 284, Laws of 1897) under which the defendant in error has demanded from your petitioners the sum of $113,449.40 as an alleged succession tax on property which passed by deeds made in 1844, 1848, 1849 and 1865 by William B. Astor,

the ancestor of your petitioners. Said property was appointed under powers of appointment given to Laura A. Delano by those deeds.

II.—The Court of Appeals of the State of New York has held that the New York Transfer Tax Law with its amendments was not an exercise of the general taxing power of that State, but must be regarded only as imposing a succession tax (*Matter of Pell*, 171 N. Y., 48) and in the present case that Court has followed its earlier decision (*Matter of Delano*, 176 N. Y., 486).

III.—This Court and the New York Court of Appeals have held that the power of the several states to impose succession taxes is not subject to the same limitations under the Constitution of the United States as their general power of taxation, because the imposition of a succession tax is a part of the power possessed by the states with respect to the succession to property left within their jurisdiction when the owner of such property has died; and this Court has held that the power of one of the states to impose a succession tax depends on its power to regulate the succession to the particular property involved by reason of the death of the former owner of such property. (*Mager* v. *Grima*, 8 Howard, 490, 493; *United States* v. *Perkins*, 163 U. S., 625, 627; *Knowlton* v. *Moore*, 178 U. S., 41, 56; *Plummer* v. *Coler*, 178 U. S., 115, 124; *Matter of Sherman*, 153 N. Y., 1.)

IV.—Since the delivery of said deeds in 1844, 1848, 1849 and 1865, no owner of the property appointed to your petitioners has died, and said property has not come within the reach of any succession laws or statute of wills of the State of New York.

V.—Said property was not the property of said Laura A. Delano; but the Legislature of the State of New York, enacted by Chapter 284 of the Laws of 1897, that appointments should be deemed to be transfers caused by the death of an owner, although not so in fact, and further enacted that a portion of the property should be taken by the State as though such property had belonged to the donee of the power, although that was not the fact. (Chap. 284, Laws of 1897; General Tax Law of New York, Sec. 242.)

VI.—The decision of the Court of Appeals of New York depriving your petitioners of a portion of their property in the form of a succession tax was based wholly on the provisions of said Chapter 294 of the Laws of 1897 (*Matter of Delano*, 176 N. Y., 486) and said Court of Appeals has held that if the said Act of 1897 did not exist, the laws of the State of New York would not permit any portion of property appointed as aforesaid to be taken in the form of a succession tax. (*Matter of Harbeck*, 161 N. Y., 211.)

VII.—The power of the State of New York to exact the succession tax is limited to a transfer taking effect upon the death of an owner, but in this case, your petitioners have not succeeded to any property upon the death of an owner, and your petitioners respectfully submit that the provisions of Chapter 284 of the Laws of 1897 are unconstitutional if intended to apply to this case, because the power of the State to impose a succession tax depends upon the actual existence of facts, which that statute declares shall be deemed to exist, but which, in this case, did not in fact exist.

If Chapter 284 of the Laws of 1897 is regarded as in any respect an exercise of the general taxing power of the State of New York, that statute vio-

lates Section 1 of the fourteenth amendment to the Constitution of the United States by reason of its inequalities and discriminations. The constitutional objections to said Act in this regard have not been presented to this Court in this case, because it has been assumed that such statute would be considered only as imposing a succession tax, and such constitutional objections have not been considered in earlier succession tax cases in this court for the reason that this is the first of such cases to reach this court where the owner of the property in question has not died. If the general taxing power of the State of New York has been considered to play any part in the upholding of this exaction, your petitioners respectfully pray to be allowed to present their argument on this subject, the highest Court of the State of New York having upheld your petitioners' contention that the Transfer Tax Act is unconstitutional by reason of its discriminations, if regarded as an exercise of the State's general power of taxation. (*Matter of Pell*, 171 N. Y., 48).

VIII.—Your petitioners respectfully submit that the decision in *Orr* v. *Gilman*, 183 U. S., 278, referred to in the opinion of this Court, does not apply here, because in that case, the power was created by the will of the owner of the property and became operative only through his death, while in this case, the power was created by the deeds which took effect on delivery, and neither the donor nor the donee of the property were at the time of their death the owner of the interest upon which it is sought to impose the tax. And your petitioners further respectfully submit that the decision of the Court of Exchequer in *Attorney-General* v. *Upton*, L. R. 1 Ex., 224, referred to in the opinion of this Court, does not apply in this case, because the question here is not as to the interpre-

tation of the statute, but whether the Constitution of the United States forbade the passing of the statute—a question which could not arise in a Court in Great Britain.

IX.—William B. Astor in making the grants and creating the powers contained in said deeds, and in providing for the exercise of said powers, did not, in any case, subject the property affected to any of the laws of the State of New York affecting the making of wills or affecting the succession to property of deceased persons, but the estates granted and the powers given by, and exercised under, said deeds depended for their validity on the force of the contracts evidenced by said deeds. (Record on Appeal, pp. 84-93).

X.—William B. Astor by said deeds granted to Laura A. Delano the power to appoint the whole of the property therein referred to, and this Court has expressly said that such a power was a contract right and that a State statute impairing that right would violate the Constitution of the United States. (*Dartmouth College* v. *Woodward*, 4 Wheaton, 518, 698).

XI.—The trustees of the trusts created by said deeds were required by the terms thereof to deliver to your petitioners all of the property in their possession as such trustees, but said trustees have refused to pay and deliver to your petitioners more than 95 per cent. of said property, and have alleged, as an excuse for not paying or delivering the remaining five per cent. thereof, that under said statute of 1897, the Legislature of the State of New York has required them to retain the remaining five per cent. for the State Treasury. Such refusal on the part of such trustees is in violation of a decision of this Court to the effect:

> "That no State, by virtue of its taxing power, can say to a debtor, 'You need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the State treasury.'"
>
> (*Murray* v. *Charleston*, 96 U. S., 432, 444.)

Your petitioners therefore respectfully pray that this case be restored to the docket, and that a rehearing be ordered.

And the undersigned, being a member of the bar of this honorable Court, humbly conceives it to be proper that the questions arising upon the writ of error herein should be reheard by this Court, if this Court should see fit to so order, and respectfully certifies accordingly.

LUCIUS H. BEERS,
Counsel for Plaintiffs in Error.

DEFENDANT'S BRIEF

Supreme Court of the United States.

WINTHROP ASTOR CHANLER, THOMAS T. SHERMAN, as Committee for John Armstrong Chanler, *et al.*, Plaintiffs in Error, vs. OTTO KELSEY, Comptroller of the State of New York, Defendant in Error.	October Term, 1906. No. 240.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

This case arises on writ of error to the Surrogate's Court of the County of New York in the State of New York, to review the determination of the Court of Appeals of the State of New York, affirming an order of said Surrogate's Court imposing a tax on certain remainders appointed to the plaintiffs in error by and under the last will and testament of Laura Astor Delano, deceased.

On September 10th, 1844, John Jacob Astor, William B. Astor and Margaret his wife, made an instrument in writing in the nature of a deed (pp. 89-92) by which they transferred and conveyed to Laura, the daughter of said William B. and Margaret (afterwards Laura Astor Delano) in contemplation of her marriage, certain real and personal

property therein described, for her life. As to the personal property, said instrument contained the following clause by which said daughter, Laura, was given a power of appointment over said sum and provision made for its disposition in case of her failure to exercise such power (p. 90):

> "And in consideration as aforesaid the said "John Jacob Astor and William Backhouse "Astor do give and grant the capital of the "said One hundred and fifty thousand dollars, "on the death of the said Laura to her surviv- "ing issue, in such manner and proportions as "she may in her discretion (as by an express "power) appoint by instrument in the nature "of a will; and in default of such appointment "to such issue, in equal shares, *per stirpes;* "Provided, however, that an express discre- "tionary power is hereby granted to her to "give not exceeding one-fourth part thereof by "will to her husband surviving her; And in "case the said Laura shall leave no surviving "issue, or in case any of such issue shall de- "part this life under the age of twenty-one "years, then the share or shares which would "have gone to such issue, shall be and are "hereby given to the persons who would be the "legal representatives of the said Laura by "consanguinity only, and if the said Laura "shall die leaving no issue, the further express "power is given to her to appoint the said cap- "ital to and amongst such representatives, or "any of them in such shares and manner as she "may think fit and to give to her husband not "exceeding one-fourth part as aforesaid."

In the same deed, as to the real estate therein conveyed, there was the following provision (p. 91):

> "Provided, however, and power is hereby "granted unto the said Laura in her discretion "to give the said lands or any share or part "thereof to and amongst her said issue or "heirs, in such manner and proportion as the "may appoint by instrument in its nature tes

"tamentary to be acknowledged by her as a
"deed and in presence of two witnesses or
"published by her as a will."

On the 30th day of September, 1848, the said William B. Astor and wife conveyed to their daughter Laura, then Laura Astor Delano, certain real estate therein described for and during her life, with power of appointment as to said property as follows (p. 85):

"Provided, however, and power is hereby
"granted unto the said Laura, in her discre-
"tion to give the said land and premises or
"any share or part thereof to and amongst her
"said issue, brothers, sister Alida, or their
"issue, in such manner and proportions as
"she may appoint by instrument in its nature
"testamentary to be acknowledged by her as
"a deed in the presence of two witnesses or
"published by her as a will."

On the 6th day of September, 1849, the said William B. Astor by deed transferred to trustees therein named certain certificates representing $50,000 of the public debt of the State of Ohio, to hold the same in trust for the benefit of Laura Astor Delano during her life, and at her death to transfer and convey the capital of the said stock to her issue, but in case she left no issue, then to her surviving brothers and sister Alida and to the issue of any of them who died leaving issue, but said instrument contained a power of appointment to the said Laura Astor Delano as follows (p. 88):

"Provided, however, that it shall be lawful
"for the said Laura, by any instrument exe-
"cuted duly as a will of personal estate, to
"dispose of the said capital unto and amongst
"her issue, brothers, sister and their issue, in
"such shares and proportions as she may
"think fit and upon such limitations, by way
"of trust or otherwise as in her discretion may
"be lawfully devised."

On the 28th day of October, 1865, the said William B. Astor by another instrument in writing made between himself and certain persons therein named as trustees, and Laura Astor Delano, transferred to the trustees one hundred thousand dollars of the public debt of the State of New York and one hundred thousand dollars of the public debt of the State of Ohio, to receive the income therefrom and apply it to the use of said Laura Astor Delano during her life, with certain provisions for its disposition in case the said Laura Astor Delano should not exercise a power of appointment therein given to her as follows (p. 94):

> "Provided, however, and these presents are "on the limitations and condition further: "That it shall be lawful for my said daughter, "party of the third part, by any instrument "testamentary in its nature and executed as "such, to give, appoint and bequeath the said "sum now settled and any part and parcel "thereof to and amongst my children or their "issue or any one or more of them who may "survive her in the event of her death without "surviving issue, or of the death of such issue "under the age of twenty-one years.
>
> "Provided also that my said daughter may "in her discretion to be exercised or withheld "at her pleasure, by an instrument in the "nature of a will give any amount not exceeding one-half of the capital to her husband if "he shall survive her."

By the third clause of his last will and testament said William B. Astor also bequeathed certain personal estate to said Laura Astor Delano for life, with a power of appointment as follows (p. 96):

> "And I give to each of the said daughters "and to my grand-daugher the power, notwithstanding the above limitations of capital, to "dispose thereof to and amongst her kindred "of my blood or any of them in such sums or "proportions as she may think fit, so that the

"same may be done by an instrument of ap-
"pointment testamentary in its character and
"execution."

The codicil of January 19th, 1865, contained a bequest to his daughter, Mrs. Alida Carey, for life "with the like power of appointment as is contained in second and third clauses of my said will," and said codicil also contained another bequest to his daughter, Laura Astor Delano, for life, "with a like limitation on her death and a like power of appointment."

William B. Astor died on the 24th day of November, 1875.

Laura Astor Delano died on the 15th day of June, 1902, leaving no husband, no children nor the issue of any deceased children surviving her.

She left a last will and testament and codicil which were admitted to probate by one of the Surrogates of the County of New York on the 14th day of October, 1902. (Pp. 75-82.)

In and by said will she exercised the powers of appointment vested in her by said above-mentioned deeds and will of her father.

A proceeding was instituted before the Surrogate of the County of New York for the appointment of an appraiser to ascertain the amount of the tax upon the property transferred and appointed by said last will and testament of said Laura Astor Delano.

The appraisal was thereafter made; said Appraiser filed his report to the Surrogate, and an order fixing the amount of said tax was duly entered by the Surrogate on the 22d day of March, 1905. (Pp. 32-37.)

From that order an appeal was taken to the Appellate Division of the Supreme Court, First Department, where the order of the Surrogate was

unanimously affirmed, without opinion (p. 110), and from that order of affirmance an appeal was taken to the Court of Appeals.

The Court of Appeals affirmed the order of the Appellate Division and of the Surrogate, and it is from that order of affirmance that this appeal or Writ of Error is taken.

The question before this Court can be stated in no better language than that used by Judge Vann of the Court of Appeals of the State of New York upon appeal of Arthur Astor Carey from the order of the Surrogate refusing to dismiss the proceedings as to him (*Matter of Delano*, 176 N. Y., 486):

> "This appeal presents the question whether "the legislature is prohibited by the Constitu- "tion, State or Federal, from passing an act "to impose a transfer tax upon the exercise, "by a last will and testament, of a power of "appointment derived from a deed, executed "before the passage of any statute imposing a "tax upon the right of succession to the prop- "erty of a decedent."

FIRST POINT.

The instrument by which Mrs. Delano exercised the powers of appointment was a "will." (See Will, pp. 75-82.)

At the time of the execution of the deeds of 1844, 1848 and 1849, the laws of the State of New York provided:

> "All persons except idiots, persons of un- "sound mind, married women, and infants, "may devise their real estate, by a last will "and testament duly executed according to the "provisions of this title."

Revised Statutes, § 1, Art. 1, Title 1, Chap. 6, part 2.

"Every male person of the age of eighteen "years or upwards, and every female not being "a married woman of the age of sixteen years "or upwards, of sound mind and memory, and "no others, may give and bequeath his or her "personal estate, by will in writing."

Revised Statutes, § 21, Art. 2, Title 1, Chap. VI, Part II.

These provisions of the Revised Statutes became law January 1, 1830.

Standing alone these provisions would prohibit a married woman at that time from making a will, but there came into existence on the same day another statute which provided as follows:

"A married woman may exercise a power "during marriage by grant or *devise*, as may "be authorized by the power, without the con- "currence of her husband, unless by the terms "of the power its execution by her during mar- "riage is expressly or impliedly prohibited."

Revised Statutes, Part 2, Chap. I, Title II, Art. III, § 110, or 1 R. S., 735, § 110.

At the time of the making of the deeds herein Laura Astor Delano had the right given by Section 110 above, to make a will for the purpose of exercising the power given by said deeds.

William B. Astor is presumed to have made these deeds with knowledge of this provision of law.

Since both the Statute of Wills and the article relating to Powers went into effect on the same day, there can be no question of the former nullifying the latter. That such is the case, and that section 110 became valid and effective for the purpose for which it was created is shown by the decision of Chancellor Walworth in *Strong* v. *Wilkin* (1 Barb. Ch., 1), wherein he says, at page 13:

"For the article of the Revised Statutes in "relation to powers expressly authorizes a "married woman to execute a power, either by "grant or by devise as may be authorized by "such power. And she is also authorized to "take a general and beneficial power to dis- "pose of lands during marriage. It is wholly "impossible, therefore, to suppose that the "legislature could have intended to give to "a *feme covert* this right to dispose of real "estate by devise, in which she had a beneficial "interest under a power, and to deprive her of "the right to make a similar disposition of her "personal property by will, where such prop- "erty was held by trustees for her separate "use, with power to appoint same by will at "her death."

To the same effect is *Wadhams* v. *American Home Missionary Society* (10 Barb., 597), where it is said, at page 604:

"It cannot be denied that a power can be "conferred on and held by a married woman. "If there ever was any doubt on that point, it "is effectually removed by the Revised Stat- "utes (Part 2, Chapter 1, Title 2, Art. 3, 1 "R. S., 755) in treating of powers, for the "109th Section expressly recognizes such ca- "pacity in her, and the 110th Section provides "that a married woman may execute a power "during her marriage, by grant, or devise, as "may be authorized by the power, without the "concurrence of her husband."

Again in the same opinion, the Court referring to the provisions in both the Statute of Wills and the Statute of Powers relating to married women, says: "It should not be assumed that the legislature in- "tended to prohibit, in the one section, the exercise "of a power which was clearly granted in "another."

This case, though reversed on appeal because of a defect in the provisions of the ante-nuptial settle-

ment, was sustained so far as it deals with the rights of married women to exercise a power of appointment by a devise contained in a last will and testament. Judge Denio saying, in 12 N. Y., at page 422:

> "It follows that a married woman cannot in "England, and could not in this country until "the passage of the act respecting married "women in the year 1849, make a will of her "real estate, except by virtue of a power or by "way of appointing a use; but where she is "clothed with such a power, her coverture "forms no impediment to the transaction."

As late as 1877, in *Albrecht* v. *Pell* (11 Hun, 127-129), dealing with a trust which had been exercised in 1841, the Court took occasion to reaffirm the above doctrine, although the decision of the case was upon another point. Daniels, J., saying:

> "Before that (Married Woman's Act of "1849) her will was deemed sufficient to de-"vise an equitable estate, under the authority "of such a power, which would entitle the "devisee, through the intervention of a court "of equity, to a conveyance of the legal estate "from the heir."

While there is some conflict in the decisions as to whether under Section 110 of the Statute of Powers a married woman can exercise a power of appointment by deed or will, which relates to personalty only, this question is of no importance in the present case for the reason that on April 11th, 1849, before the deed of September 6th relating to personalty was made, the legislature enacted the following statute conferring upon married women the right to make a will or deed of real or personal property:

> "Any married female may take by inherit-"ance or by gift, grant, devise or bequest, from "any person other than her husband and hold

"to her separate and sole use and convey and "devise real and personal property, and any "interest or estate therein, and the rents, is- "sues and profits thereof in the same manner "and with like effect as if she were unmarried, "and the same shall not be subject to the dis- "posal of her husband, nor be liable for his "debts." (Laws 1849, Chap. 375, Sec. 3.)

In addition to the privilege of making a will exercising the powers of appointment granted her, which Laura Astor Delano enjoyed from the time of the creation of such powers by virtue of Section 110 of the Statute of Powers and Sec. 3 of Chap. 375, Laws of 1849, as set forth in the preceding paragraph, her disability, as a married woman, to make a will of realty or personalty under the Statute of Wills was entirely removed in 1867 by the enactment of the following statutes:

"Section 3. The first section of Article 1, "Title 1, Chapter six of the Second part of the "Revised Statutes is hereby amended by strik- "ing out the words 'married women' so that "such section shall read as follows: 'Section "'1. All persons, except idiots, persons of un- "'sound mind and infants, may devise their "'real estate, by a last will and testament, "'duly executed, according to the provisions "'of this title.'" (Section 3, Chap. 782, Laws of 1867.)

"Section 4. The 21st Section of Article 2, "Title 1, Chapter 6 of the Second Part of the "Revised Statutes is hereby amended by strik- "ing out the words 'not being a married "'woman,' so that such section shall read as "follows: 'Section 21. Every male person of "'the age of eighteen years or upwards, and "'every female of the age of sixteen years or "'upwards, of sound mind and memory, and no "'others, may give and bequeath his or her "'personal estate, by will in writing.'" (Section 4, Chap. 782, Laws of 1867.)

SECOND POINT.

The decision of the Court of Appeals of the State of New York that the statute, Chapter 284 of the laws of 1897, sub-division 5 of Section 220 of the Tax Law, does not violate any provision of the Constitution of the State of New York will be regarded as conclusive upon this Court upon that question.

Orr v. *Gilman*, 183 N. Y., 278.
People ex rel. Met. St. Ry. Co. v. *N. Y. State Board of Tax Com'rs.*, 199 U. S., 1.
Seneca Nation v. *Christie*, 162 U. S., 283.
Missouri R. R. v. *Haber*, 169 U. S., 613.
Smiley v. *Kansas*, 196 U. S., 447.
Hibben v. *Smith*, 191 U. S., 310.

THIRD POINT.

The legislature of the State of New York had the right to enact Chapter 284 of the laws of 1897 (now sub-division 5 of Section 220 of the Tax Law), and the same is not a violation of any of the provisions of the Constitution of the United States.

The provision in question which is referred to as the amendment of 1897, is as follows:

"Whenever any person or corporation shall "*exercise a power of appointment derived from* "*any disposition of property made either be-*

"*fore or after the passage of this act, such ap-*
"*pointment when made shall be deemed a*
"*transfer taxable under the provisions of this*
"*act* in the same manner as though the prop-
"erty to which such appointment relates be-
"longed absolutely to the donee of such power
"and had been bequeathed or devised by such
"donee by will; and whenever any person or
"corporation possessing such a power of ap-
"pointment so derived shall omit or fail to
"exercise the same within the time provided
"therefor, in whole or in part, a transfer tax-
"able under the provisions of this act shall be
"deemed to take place to the extent of such
"omissions or failure, in the same manner as
"though the persons or corporations thereby
"becoming entitled to the possession or enjoy-
"ment of the property to which such power re-
"lated had succeeded thereto by a will of the
"donee of the power failing to exercise such
"power taking effect at the time of such omis-
"sion or failure."

The legislature by this act does not impose a tax upon property, but it does impose a tax upon the exercise of a power of appointment.

It can make no difference when the right was given to the exercise of the power, or how it was created. No tax is made upon the giving of the power, but only upon the exercise by the donee of the power of appointment.

As was said by Judge Gray in *People ex rel. Eisman* v. *Ronner* (185 N. Y., 286):

"The power of the State in its sovereign ca-
"pacity to impose taxes is unlimited in extent,
"so far as no constitutional guaranty is in-
"fringed upon, and is controlled only by the
"considerations of wisdom and policy, to be,
"reasonably, expected of a legislative body,
"acting upon the interests of its constituents.
"In the raising of revenues for the needs of
"government, the power may be exercised upon
"every occupation, every object of industry, or
"enjoyment, and every species of possession.

> "The purpose of a system of taxation; the apportionment of a tax and the property, or persons to be affected are matters within the legislative discretion." (Page 290.)

This amendment cannot violate the Constitution of the United States unless, as is pointed out by plaintiffs in error in their Assignment of Errors, it impairs the obligation of a contract between William B. Astor and the plaintiffs in error, made prior to the passage and enactment of the statute, and unless also, that it deprives the plaintiffs in error of their property without due process of law, and denies to them the equal protection of the laws.

AS TO THE FIRST ASSIGNMENT OF ERROR, THAT SAID STATUTE IMPAIRS THE OBLIGATION OF A CONTRACT BETWEEN WILLIAM B. ASTOR AND THE PLAINTIFFS IN ERROR.

The deeds made by William B. Astor did not constitute a contract between him and these plaintiffs in error. They were not mentioned therein except as a class. If any of them died their places were to be taken by their issue or other persons designated. If Laura Astor Delano exercised the power of appointment given to her they might all except one be cut off from any participation in said property. The right was absolute in said Laura Astor Delano to cut them off. This being so, it cannot be seriously argued that there was any contract between them and the grantor of the power. An agreement that A will give something to B, but which is contingent upon the exercise of the right of C to divert it at will from B and give it to D, can hardly be said to create a contract.

Again, if there could be said to be any such contract as to any of the plaintiffs in error by reason

of such deeds, it was subject to the right of Laura Astor Delano, created by the same instruments, to appoint and give the property to some one else.

AS TO THE SECOND ASSIGNMENT OF ERROR THAT THIS STATUTE DEPRIVED THE PLAINTIFFS IN ERROR OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

As to this claim attention is called to the opinion of Judge Gray in *People ex rel. Eisman* v. *Ronner* (185 N. Y., 293), where he said:

> "The provisions of the fourteenth amend-
> "ment of the Federal Constitution, so fre-
> "quently invoked with such irrelevance as to
> "suggest the existence of considerable confu-
> "sion of thought as to its intended scope, are
> "appealed to and the argument is made that
> "the mortgagee has no opportunity for a hear-
> "ing upon the value of the debt and the mort-
> "gage. *Taking property under the taxing*
> "*power is taking it by due process of law.* In
> "such a case, due process of law does not mean
> "some judicial proceeding. * * * Due pro-
> "cess of law and the equal protection of the
> "laws are secured, if the law operates alike
> "upon all who are similarly situated and if it
> "does not subject the person to an arbitrary
> "exercise of the powers of government. (See
> "*McMillan* v. *Anderson*, 95 U. S., 37; *Duncan*
> "v. *Missouri*, 152 ib., 377.) The provision for
> "due process of law has no application to such
> "a case as this, where the relator's property
> "has been taken under the form of a tax im-
> "posed by an act of the legislature."

This was an action to test the validity of the act passed by the legislature of the State of New York in 1905 (Chap. 729) entitled "An Act to amend the Tax Law in relation to the taxation of debts secured by mortgages."

In *United States* v. *Perkins* (163 U. S., 625) the appeal was from an order assessing an inheritance tax upon property bequeathed by the testator to the United States, and the question was whether it was within the power of the State to tax bequests to the United States, and the Court said, at page 628:

> "Thus the tax is not upon the property, in "the ordinary sense of the term, but upon the "right to dispose of it, and it is not until it has "yielded its contribution to the State that it "becomes the property of the legatee."

And at page 627:

> "While the laws of all civilized States rec- "ognize in every citizen the absolute right to "his own earnings, and to the enjoyment of his "own property, and the increase thereof, dur- "ing his life, except so far as the State may "require him to contribute his share for public "expenses, the right to dispose of his property "by will has always been considered purely a "creature of statute and within legislative "control."

In *McMillan* v. *Anderson* (95 U. S., 37) the Court construed a statute of the State of Louisiana, in relation to licensing dealers in liquors, where it was claimed that the act deprived plaintiff of his property without due process of law, and the Court said, at page 41:

> "The mode of assessing taxes in the States "by the Federal government, and by all gov- "ernments, is necessarily summary, that it "may be speedy and effectual. By summary is "not meant arbitrary, or unequal, or illegal. "It must, under our Constitution, be lawfully "done.
>
> "But that does not mean, nor does the phrase "'due process of law' mean, by a judicial pro- "ceeding. The nation from which we inherit "the phrase 'due process of law' has never "relied upon the courts of justice for the col-

"lection of her taxes, though she passed "through a successful revolution in resistance "to unlawful taxation."

In *Duncan* v. *Missouri* (152 U. S., 377) it was held that "due process of law and the equal pro- "tection of the laws are secured if the laws operate "on all alike, and do not subject the individual "to an arbitrary exercise of the powers of "government."

In *United States* v. *Fox* (94 U. S., 315) the facts were: In February, 1870, Charles Fox, of the City of New York, died possessed of certain real and personal property, situated in the State of New York. By his will he left the whole of it to the United States government for the purpose of assisting to discharge the debt created by the War of the Rebellion. The infant heirs of testator contested the will and it was held inoperative and void as a devise of real estate; that the United States could not lawfully take and hold the real estate as devisee under the will, in trust or otherwise, and that it descended to the heirs. As to the personal estate the will was valid. Upon appeal to this Court, Mr. Justice Field, at page 320, said:

"The power of the State to regulate the "tenure of real property within her limits, and "the modes of its acquisition and transfer, and "the rules of its descent, and the extent to "which a testamentary disposition of it may "be exercised by its owners, is undoubted. It "is an established principle of law, everywhere "recognized, arising from the necessity of the "case, that the disposition of immovable prop- "erty, whether by deed, descent or any other "mode, is exclusively subject to the govern- "ment within whose jurisdiction the property "is situated. * * * Statutes of Wills, as is "justly observed by the Court of Appeals, are "enabling acts, and prior to the statute of

"32 Hen. VIII, there was no general power at "common law to devise lands. * * * Every "person must, therefore, devise his lands in "that State within the limitations of the stat- "ute or he cannot devise them at all. His "power is bounded by its conditions."

An inheritance tax is not one upon property, but one on the succession.

The right to take property by devise or descent is the creature of the law, and not a natural right — a privilege, and therefore the authority which confers it may impose conditions upon it.

Magoun v. *Illinois Trust & Savings Bank,* 170 U. S., 283-288.
United States v. *Perkins,* 163 U. S., 625.
In re Cullom, 145 N. Y., 593.
Wallace v. *Myers,* 38 Fed. Rep., 184.
Matter of Hoffman, 143 N. Y., 327.

In *Mager* v. *Grima* (8 How. [U. S.], 490) there was considered the validity of a law of Louisiana imposing a tax of ten per cent upon legacies, when the legatee was neither a citizen of the United States nor domiciled therein.

Mr. Chief Justice Taney said:

"Now the law in question is nothing more "than an exercise of the power which every "State and sovereignty possesses, of regulat- "ing the manner and term upon which prop- "erty, real or personal, within its dominions "may be transmitted by last will and testa- "ment, or by inheritance; and of prescribing "who shall and who shall not be capable of "taking it. Every State or nation may un- "questionably refuse to allow an alien to take "either real or personal property, situated "within its limits, either as heir or legatee, "and may, if it thinks proper, direct that prop- "erty so descending or bequeathed shall belong

"to the State. * * * And if a State may "deny the privilege altogether, it follows that, "when it grants it, it may annex to the grant "any conditions which it supposes to be re- "quired by its interests or policy."

In *Plummer* v. *Coler* (183 U. S., 115) the question was whether under the inheritance tax laws of the State of New York, a tax might be validly imposed on a legacy consisting of United States bonds issued under a statute declaring them to be exempt from State taxation in any form, and it was held that the tax is not a tax upon the property itself, but upon its transmission by will or by descent.

In the *Matter of Dows* (167 N. Y., 227) the facts were these: David Dows, Sr., died March 30th, 1880, leaving as a part of his estate a valuable piece of real property, which he devised to his trustees in trust to pay the income to his son, David Dows, Jr., during life, "And upon the death of my said son the said property, with all accumulations of interest, income and profits shall vest absolutely, and at once, in such of his children him surviving, and the issue of his deceased children as he may by his last will and testament designate and appoint, and in such manner, and upon such terms as he may legally impose. But in case my said son David Dows, Jr., die intestate, then said property, with all accumulations of interest, income and profits shall vest absolutely and at once in his children him surviving, share and share alike, and the issue of his deceased children (such issue to take share and share alike the portion which the parent would have received if living) to be paid to them at the times and in the proportion following, to wit," etc.

A similar devise was made of a share of the testator's residuary estate. The will gave the trus-

tees a power of sale over the real property, which was exercised during the life of David Dows, Jr., and a large portion of the proceeds invested in the stocks of corporations. David Dows, Jr., died January 13, 1899, leaving a will by which he exercised the power of appointment given him by the will of his father, in favor of his three sons.

The Court of Appeals, by Cullen, J., said:

"The first objection raised to the order of "the Surrogate's Court is that the tax imposed "under the amendment of April 16th, 1897 "(Chap. 284), to the Taxable Transfer Act of "1896, upon transfers made under a power of "appointment, is a tax on property and not on "the right of succession, and that, therefore, "so much of the fund as was invested in in-"corporated companies liable to taxation on "their own capital and in certain bonds of the "State of New York and bonds of the City of "New York exempt from taxation by statute, "was not subject to the tax.

"On this question we are concluded by the "previous decisions of this Court (*Matter of "Vanderbilt,* 163 N. Y., 597; affirmed on opin-"ion of Justice Patterson below in 50 App. "Div., at p. 246); and little need be said now "thereon. * * *

"*But whatever be the technical source of title "of a grantee under a power of appointment, "it cannot be denied that in reality and sub-"stance it is the execution of the power that "gives to the grantee the property passing "under it.* The will of Dows, Sr., gave his son "a power of appointment to be exercised only "in a particular manner, to wit, by last will "and testament. If, as said by the Supreme "Court of the United States, the right to take "property by devise is not an inherent or natu-"ral right, but a privilege accorded by the "State, which it may tax or charge for, it fol-"lows that the right of a testator to make a "will or testamentary instrument is equally a "privilege and equally subject to the taxing "power of the State.

"When David Dows, Sr., devised this prop-
"erty to the appointees under the will of his
"son, he necessarily subjected it to the charge
"that the State might impose on the privilege
"accorded to the son of making a will. That
"charge is the same in character as if it had
"been laid on the inheritance of the estate of
"the son himself, that is, for the privilege of
"succeeding to property under a will. * * *
"As we have held that it is the execution of
"that power which subjects grantees under it
"to the transfer tax, it follows that the condi-
"tion or form of the property at the time of
"such execution must control."

This case was taken to the Supreme Court of the United States under the title of *Orr* v. *Gilman* (183 U. S., 278), and this Court by Mr. Justice Shiras said:

"It is claimed that, under the law of the
"State of New York as it stood at the time of
"his death in 1890, David Dows, Senior, had a
"legal right to transfer, by will, his property
"or any interest therein, to his grandchildren,
"without any diminution, or impairment, then
"imposed by the law of the State upon the
"exercise of that right; that his said grand-
"children acquired vested rights in the prop-
"erty so transferred, and that the subsequent
"law, whose terms have been above tran-
"scribed, operates to diminish and impair
"those vested rights. In other words, it is
"claimed that it is not competent for the State,
"by a subsequent enactment, to exact a price,
"or charge for a privilege lawfully exercised
"in 1890, and to thus take from the grandchil-
"dren a portion of the very property the full
"right to which had vested in them many
"years before.
"We here meet, in the first place, the ques-
"tion of the construction of the will of David
"Dows, Senior. Under and by virtue of that
"will, did the property, whose transfer is
"taxed, pass to and become vested in the
"grandchildren, or did the property not be-
"come vested in them until and by virtue of

"the will of David Dows, Junior, exercising "the power of appointment? The answer to "be given this question must, of course, be "that furnished us by the Court of Appeals in "this case. (Matter of Dows, 167 N. Y., 227.)"

Then follows a quotation from the opinion of Judge Cullen, and Mr. Justice Shiras continued:

"While it is settled law that this Court will "follow the construction put by the State "Courts upon wills devising property situated "within the State, and while it is also true "that we adopt the construction of its own "statutes by the State courts, a question may "remain whether the statute, as so construed, "imports a violation of any of the rights se- "cured by applicable provisions of the Con- "stitution of the United States. And such is "the contention here.

"This Court has no authority to revise the "statutes of New York upon any grounds of "justice, policy or consistency to its own Con- "stitution. Such questions are concluded by "the decision of the legislative and judicial "authorities of the State."

After citing some authorities, the opinion continues:

"In the light of the principles thus estab- "lished we are unable to see in this legislation "of the State of New York, as construed by "its highest Court, any infringement of the "salutary provisions of the Fourteenth "amendment. There are involved no arbitrary "or unequal regulations, prescribing different "rates of taxation on property or persons in "the same condition. The provisions of the "law extend alike to all estates that descend "or devolve upon the death of those who once "owned them. * * * The Court of Appeals "held that it was the execution of the power "of appointment which subjected grantees "under it to the transfer tax. This conclusion "is binding upon this Court in so far as it "involves a construction of the will and of the

"statute. Nor are we able to perceive that
"thereby the plaintiffs in error were deprived
"of any rights under the Federal Constitution.
"The rule of law laid down by the New
"York Courts is applicable to all alike, and
"even if the view of the Court of Appeals re-
"specting the question was wrong, it was an
"error which we have no power to review."

In *Matter of Vanderbilt* (50 App. Div, 246; affirmed upon the opinion of Appellate Division in 163 N. Y., 597).

William H. Vanderbilt died in 1885 and his will was proved in December of that year. A trust fund was created for his son, Cornelius, for life. Testator directed that upon the death of Cornelius the fund should be paid to his lawful issue in such shares or proportions as Cornelius might by his last will have directed or appointed, and in default of such appointment, the gift is made directly to the issue with an altenative disposition on failure of such issue.

Cornelius Vanderbilt died in 1899, leaving a will by which he exercised the power of appointment given by the will of his father.

At the time of the death of William H. Vanderbilt, this fund, or the right of possession of it, was not taxable.

The question was as stated by Judge Patterson:

"Is the right of succession to the trust fund
"created by the will of William H. Vanderbilt
"and as to which a power of appointment was
"given to the testator's son Cornelius Vander-
"bilt, subject to the imposition of a transfer
"tax under the provisions of Chapter 284 of
"the Laws of 1897?"

And he said at page 251:

"The exact situation of the fund in this case
"as affected by the question is the following:
"For purposes of general construction and the

"derivation of title to the fund as it now "stands, the gift of the remainder comes under "the will of William H. Vanderbilt. When he "died, the law as it then existed made no pro- "vision for the taxation to the ultimate right "of succession to the fund. The legal title to "it upon the probate of his will was in his "executors until they accounted in the Surro- "gate's Court, constituted the funds out of "the assets of the estate, and transferred it "from themselves as executors to themselves "as trustees, which we assume in this case "was done. Then they held the fund still "under the will but undistributed and finally "undistributable until the power of appoint- "ment was exercised by Cornelius Vanderbilt.

"Meantime, and while they held it so un- "distributed in fact, the State, in the exercise "of its general power of taxation, found it "expedient to tax the right to the succession, "which right had not theretofore been taxed, "making the transfer consist in that act by "which each of the appointees became entitled "to claim and to receive the particular or spe- "cific distributive share allotted to him. Of "the general power of the State to fix the time "at which the right of succession shall be "taxed, and to define what shall be a transfer "within the meaning of that act, we have no "doubt, so long as that definition does not in- "volve a violation of either contract or vested "rights, and, as we have said, no contract re- "lation was established by the act of "1885. * * *

"If the right of succession to this fund was "taxable, as we think it was, the legislature "had the power to declare that the tax should "be imposed as of the time at which the right "to possession of the amount appointed of the "fund to each of the remaindermen became "fixed and determined by the exercise of the "power of appointment."

FOURTH POINT.

The amendment of 1897 was a tax upon the exercise of a power of appointment.

Matter of Swift, 137 N. Y., 77.
In re *Cullom,* 145 N. Y., 593.
Matter of Hoffman, 143 N. Y., 237.
Knowlton v. *Moore,* 178 U. S., 41.
Strode v. *Commonwealth,* 52 Penn. St., 181.

The legislature had the unquestioned right to enact this amendment.

In this case the power was exercised by will.

> "The privilege of making a will is not a "natural or inherent right, but one which the "State can grant or withhold in its discretion. "If granted, it may be upon such conditions "and with such limitations as the legislature "sees fit to create. * * * The legislature "could provide that no power of appointment "should be exercised by will or that it should "be exercised only upon the payment of a gross "or ratable sum for the privilege. It could ex- "act this condition, independent of the date "or origin of the power."
>
> Opinion of Vann, J., *Matter of Delano,* 176 N. Y., 486.

If the amendment had read: "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be * * * taxable under the provisions of this act" it would have made all such appointments taxable.

It was not necessary to the validity of the act to say that such appointment "shall be deemed a transfer taxable under the provisions of this act."

Nor was it necessary to its validity to add "in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

As is shown above the legislature had the right to control or regulate the making of a will or to provide that it should not be made, or that no power of appointment could be exercised except upon the payment of a sum fixed for the privilege.

Matter of Delano, 176 N. Y., 486.
Orr v. *Gilman,* 183 U. S., 278.

The words "in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will," only referred to the manner in which the tax should be imposed or fixed and did not change in any respect the nature or character of the thing to be taxed, viz., the exercise of the power of appointment. When this power of appointment was given by William B. Astor to his daughter, he necessarily subjected it to the charge that the State might impose on the privilege accorded to her of making a will.

Matter of Delano, 176 N. Y., 486.

Plaintiffs in error at page 50 of brief say that this amendment of 1897 changes the power of appointment given to Mrs. Delano and gives her "power to dispose of only 95 per cent of the remainder, giving the other 5 per cent to the state."

If this was sound reasoning every inheritance tax law would be unconstitutional.

But this is not a statement of the fact. Mrs. Delano had the power to appoint the whole estate, and after the appointment was made it became taxable by reason of the exercise of such appointment.

The fact that this is not a correct statement of the proposition is proven by considering what the result upon the property would be if Mrs. Delano had not exercised the power of appointment. The property would have remained intact. No part of it would have passed to the State.

The plaintiffs in error derive their respective rights in and to the property herein under the will of Laura Astor Delano, and they have not rejected the will or claimed the property under the deeds made by William B. Astor.

As is said by Judge Vann in his opinion (*Matter of Delano*): "He is compelled to resort to the will in order to establish his right, for the deed alone will not suffice."

In *Matter of Lansing* (182 N. Y. 238), cited by plaintiffs in error. Under a will taking effect in 1869 the testator devised certain property to trustees for each of his children living at the time of his death, to hold the portion of each child in severalty, in trust during the life of such child, and after the death of such child her portion to go to her heirs-at-law, subject to the power of such child to devise the remainder by will to the heirs-at-law and collateral relatives of such child, the exercise of the power given by such will to a daughter who died in October, 1904, leaving a will whereby she devised her share of her father's estate to her daughter, her only child and heir-at-law, and who was in being at the death of her grandfather in 1869, transfers nothing that was not given to her daughter by the will of her grandfather. At his death she took a vested interest in remainder; her rights were fixed by him subject, however, to be defeated by the exercise of a power of appointment which changed them, not by one which left them precisely as they existed under his will, and therefore it must be regarded

as a nullity; there was no transfer to her under the will of her mother, but under the will of her grandfather and at that time there was no statute imposing a transfer tax.

The imposition of such a tax upon the theory that the trust property was transferred by the will of her mother, cannot be sustained, especially when she disclaims deriving any title under the power and elects to reject it from that source.

This case is an authority for defendants in error upon the point discussed herein that no contract is created in favor of the remainderman; that while she took a vested interest the same was subject to be defeated by the exercise of the power of appointment.

If the power of appointment was exercised her rights might be changed.

If the power of appointment was not exercised, there would be no tax, but it was held that the exercise of a power of appointment which left her rights the same as though the power had not been exercised was a nullity. And in this case the daughter disclaimed any rights under the will of her mother.

In *Matter of Pell* (171 N. Y., 48), testator died in 1863 giving a life estate in all his property to his widow, with remainders over at her death to his nephews and nieces and the issue of any deceased nephew or niece, together with a share to his sister. The life tenant died December 20, 1899, at which time all the estates in remainder came into the actual possession of the beneficiaries under the will. Held, that chapter 76 of the Laws of 1899, imposing a transfer tax upon remainders vesting prior to June 30, 1885, was unconstitutional, because there had been a complete vesting of the residuary estate before the passage of the act.

The appellants in error at page 44 discuss the proposition that an appointment cannot be treated

as a succession because the appointed property does not belong to the donee of the power, and the cases cited thereon seem to bear out that view, but at the time such cases were decided there was no provision of law for the taxing of the exercise of powers of appointment.

Matter of Stewart (131 N. Y., 274) and *Matter of Harbeck* (161 N. Y., 211) and the other cases cited hold that a party who takes by a power of appointment given under a will, takes under and by virtue of the will, and if the will took effect before the enactment of the transfer tax law the bequests are not subject to any tax.

But, as the amendment of 1897 was enacted since these decisions, they are not in point.

In *Watson* v. *Bonney* (2 Sandf., 405-416), cited on page 54 of brief of plaintiffs in error, Mrs. Watson, in contemplation of her marriage, made a deed to Bonney, as trustee, of all her property, real and personal, to which Watson, who was to be her husband, was a party. She reserved to herself the income during life, and also the power of disposing of the estate by an instrument in the nature of a will. In case of her decease without making a disposition, the trustee should transfer the estate to such persons as would be the legal representatives of plaintiff.

After the act of 1848 she brought this action to set aside the trust deed. At this time she was married and had three children. The Court held that the effect of the act of 1848, which provided that the real and personal property of any married female shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were single, was not to enable married women to destroy their marriage settlements, and

used the language stated in plaintiff's brief, but this does not affect the case at bar.

The argument of plaintiffs in error as to contracts having been created in favor of these plaintiffs in error by the deeds of William B. Astor is answered fully in the opinion of the Court of Appeals (*Matter of Delano,* 176 N. Y., 486):

> "The existence of the power is the important "fact, for what may be done under it is not "affected by its origin. If created by deed its "efficiency is the same as if it had been created "in the same form by will. No more and no "less could be done by virtue of it in the one "case than in the other. * * * The power, "however or whenever created, authorized the "donee by her will to divest certain defeasible "estates and to vest them absolutely in one per-"son. * * * The statute applies to all "powers alike, without distinction on account "of the method of creation or the date of cre-"ation, and provides that the exercise of the "power shall be deemed a taxable transfer of "the property affected, the same as if it had be-"longed absolutely to the donee of the power "and had been bequeathed or devised by such "donee. * * *
>
> "Such was the effect of the exercise of the "power under consideration, for it both re-"voked and created estates in the real prop-"erty and interests in the personal property.
>
> "No tax is laid on the power, or on the prop-"erty, or on the original disposition by deed, "but simply upon the exercise of the power "by will, as an effective transfer for the pur-"poses of the act."

FIFTH POINT.

The order of the Surrogate's Court of New York County should be affirmed.

DAVID B. HILL,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 240.—October Term, 1906.

Winthrop Astor Chanler, Thomas T. Sherman, as Committee for John Armstrong Chanler, et al., Plaintiffs in Error, vs. Otto Kelsey, Comptroller of the State of New York.	In error to the Surrogates' Court of the County of New York and State of New York.

[April 15, 1907.]

This is a writ of error to the Surrogates' Court of the county of New York, State of New York, but its real purpose is to review a decision of the Court of Appeals of the State sustaining an order of the Surrogates' Court, which imposed a transfer-tax upon certain estates arising under appointment by Laura Astor Delano, deceased. 176 N. Y. 486.

Laura Astor Delano was the daughter of William B. Astor. Upon the occasion of her marriage in 1844 to Frank H. Delano, Mr. Astor executed a deed in the nature of a marriage settlement, conveying certain real and personal property to trustees in trust to pay the income to said Laura Delano for life, with remainder to her issue in fee, or in default of issue, to her heirs in fee; and giving her power in her discretion to appoint the remainder "amongst her said issue or heirs, in such manner and proportions as she may appoint by instrument in its nature testamentary, to be acknowledged by her as a deed and in the presence of two witnesses or published by her as a will."

In the years 1848–49 and 1865 William B. Astor made other deeds, by way of addition to the original marriage settlement, substantially similar in their terms. That of 1848 conveyed certain real estate to Mrs. Delano for life, with power of appointment as to said premises, or any part thereof, "to and among her said issue, brothers, sister Alida, or their issue, in such manner and proportions as she may appoint by instrument in its nature testamentary, to be acknowledged by her as a deed in the presence of two witnesses or acknowledged by her as a will." The deed of 1849 conveyed to trustees certificates for $50,000 of the public debt of Ohio; "to hold the same in trust for the benefit of Laura Astor Delano during her life, and at her death to transfer and convey the capital of the said stock to her issue, but in case she left no issue, then to her surviving brothers and sister Alida and to the issue of any of them who died leaving issue; and said

instrument contained a power of appointment to Laura Astor Delano as follows: 'Provided, however, that it shall be lawful for the said Laura, by any instrument executed duly as a will of personal estate, to dispose of the said capital unto and amongst her issue, brothers, sister and their issue, in such shares and proportions as she may think fit and upon such limitations, by way of trust or otherwise, as in her discretion may belawfully devised.'" These deeds were absolutely irrevocable, took effect upon delivery, and were not made in contemplation of the death of the grantor.

Laura A. Delano died June 15, 1902, in Geneva, Switzerland, leaving no descendants. By her last will and testament, duly admitted to probate in the county of New York on October 14, 1902, she exercised the power of appointment conferred in the deeds from her father in favor of the plaintiffs in error.

One of the plaintiffs in error, Arthur Astor Carey, a grandson of William B. Astor, and an appointee to whom Mrs. Delano had appointed the property originally conveyed by the deeds of 1848 and 1849, took an appeal from the order of the Surrogates' Court refusing to dismiss the petition to the Appellate Division of the Supreme Court, where it was held that the act under which the tax was imposed, as applied to this case, was unconstitutional. *Matter of Delano*, 82 App. Div. 147. The State comptroller appealed to the Court of Appeals from the decision of the Appellate Division.

That court sustained the right to impose the transfer tax upon the interests appointed by Mrs. Delano under the powers created by the deeds above referred to. Subsequent decisions were made *pro forma* and a final order on the last remittitur of the Court of Appeals was made in the Surrogates' Court, and the case brought here by all the plaintiffs in error.

Mr. Justice Day delivered the opinion of the Court.

The tax in controversy was imposed under an amendment of the general transfer-tax law of the State of New York, chapter 284, Laws of 1897, which provides as follows:

"Whenever any person or corporation shall exercise the power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer, taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the

persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The validity of this tax was attacked in the courts of New York upon objections pertaining to both the Federal and State constitutions. The latter are not open here, and we shall consider the case only so far as it relates to the objections made to the validity of this statute by reason of alleged violations of the Federal Constitution. These are: First, that by the imposition of the tax the property of the beneficiaries is taken without due process of law, in violation of the Fourteenth Amendment; and, second, that such taxation violates the obligation of a contract within the protection of section 10 of article 1 of the Federal Constitution.

The objection that the property is taken without due process of law is based upon the argument that the estate in remainder was derived from the deeds of William B. Astor and not under the power of appointment received from those deeds by Mrs. Laura A. Delano. In support of this contention, common law authorities are cited to the proposition that an estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power; that the beneficiary takes, not under the execution of the power by the donee, but by authority and under grant from the grantor, in like manner as if the power and the instrument which created it had been incorporated into one instrument, 4 Kent's Com. 327; 2 Washburne Real Property, 320. The argument is that the estate which arose by the exercise of the power came from William B. Astor and not from Laura A. Delano, and was vested long before the passage of the amendment of 1897, under the authority of which the tax was imposed, and to tax the exercise of the power therefore takes property without due process of law.

However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were divested of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others.

Notwithstanding the common law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title. It is

so within the purpose of the registration acts. A person deriving title under an appointment is considered as claiming under the donee within the meaning of a covenant for quiet enjoyment. 2 Sugden on Powers, 3 ed. 19.

"So on an issue to try whether the plaintiff was entitled by two writings, or any other, purporting a will of J. S., and the evidence was of a feoffment to the use of such person as J. S. should appoint by his will, in which case it was contended that the devisees were in by the feoffment and not by the will, the court held that this was only *fictione juris*, for that they were not in *without* the will, and therefore that was the principal part of the title, and such proof was good enough and pursuant to the issue, and a verdict was accordingly given for the plaintiff." Sugden on Powers, vol. 2, p. 19, citing *Bartlett* v. *Ramsden*, 1 Keb. 570.

So, in the present case, the plaintiffs in error are not in *without* the exercise of the power by the will of Mrs. Delano.

By statute in England, for the purposes of taxation, it has been provided that the donee of the power shall be regarded, in case of a general power, as the one from whom the estate came. In *Attorney General* v. *Upton et al.*, L. R. 1. Ex. 224, the Court of Exchequer had under consideration the Succession Duty Act, (16, 17 Vict. c. 51,) and it was held that the appointee under a general power of appointment, taking effect on the death happening since the commencement of the act, takes succession from the donee of the power. The testator, Admiral Fanshawe, by will devised certain lands to the use of his wife, Caroline Fanshawe, for life, remainder to such use as she should by deed or will appoint, and, in default of appointment, for the use and benefit of testator's nephews, C. F. and J. F. Fanshawe, and their issue. She by deed appointed to the use that trustees should after her death receive an annuity during the lives of the wife of the testator's nephew, and of the children of the nephew by her, in trust for the separate use of the wife, Elizabeth Fanshawe. Section 4 of the act, which is there construed, provides that any person having a general power of appointment, under any disposition of property, taking effect upon the death of any person dying after the time appointed for the commencement of the act, shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power. All the judges agreed that under section 4 of the act the nephew's wife took the annuity as a succession from the testator's widow and not from the testator himself; that, therefore, a duty of ten per cent was payable. Bramwell, B., was of opinion that the duty was also payable under section 2, which provides that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property . . . shall be deemed to have conferred, or to confer, on the person entitled by

reason of any such disposition . . . a succession." In speaking of this section the Baron said:

"Now, will these annuitants take by reason of the will of Admiral Fanshawe? We must look, not at the *causa remota*, but at the *causa proxima*, and that is the disposition of Caroline Fanshawe. Again, the act says, that the term predecessor 'shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.' From whom, then, is the interest derived? As I said in *Barker's* case (1), these are ordinary English words, and ought to be construed by lawyers as ordinary Englishmen would construe them. Now, not one man in a hundred would say that this interest was derived from Admiral Fanshawe or from any other person than the donee of the power. I do not mean to deny or attempt to cast any doubt on the rule of law that an appointee takes his estate from the donor of the power, but I say that it is a rule not applicable to the construction of this statute, and it is not true, as is supposed, that there is any decision of the House of Lords to the contrary."

The learned Baron seems to have gone farther, as to section 2, than his brethren were willing to. *Attorney General* v. *Mitchell*, L. R. 6 Q. B. D. 548. His observations are nevertheless suggestive.

While the entire bench recognized the common law rule that the estate is taken to come from the donor of the power, it enforced the statutory change as to a subsequent exercise of the power, treating the estate as coming from the donee, by whose act it was appointed to the beneficiary.

The statute of New York in question acts equally upon all persons similarly situated. It affects an estate which only became complete by the exercise of a power subsequent to its enactment.

The exercise of the power bestowing property in the present case was made by will. And we need not consider the case, expressly reserved by the Court of Appeals in its opinion, as to the result if it had been exercised by deed.

That the will was effectual to transfer the estate was ruled by the Court of Appeals, and its decision on this question is binding here, as was held in *Orr* v. *Gilman*, 183 U. S. 278, which came here for a review of a decision of the Circuit Court of Appeals of New York, rendered in *Matter of Dows*, 167 N. Y. 227, a case which arose under the same statute of 1897. In that case the testator devised real estate in trust to pay the income to his son for life, and, upon his death, to vest absolutely and at once in his children and the issue of his deceased children, as his son should appoint by will. If, however, the son should die intestate the estate was to vest absolutely and at once in his children then living, and the issue of the deceased children. The son exercised the power of appointment by his last will, probated in 1899. The Court of Appeals held that the property was subject to the taxation imposed by the act of 1897; that such tax was on the right

of succession and not on the property. It became important in that case to determine whether the property passed by virtue of the will of the donor, David Dows, Senior, and then became vested in the grandchildren, or only became vested in them when the power of appointment was exercised by the will of David Dows, Junior.

This court held that the answer to this question must, of course, be furnished by the Court of Appeals in that case. 183 U. S. 282. In other words, the Court of Appeals of New York had the exclusive right to construe instruments of title in that State, and determine for itself the creation and vesting of estates through wills under the laws of the State. "The Court of Appeals held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statutes." 183 U. S. 288. In the present case the New York Court of Appeals has spoken in no uncertain language upon the subject:

"As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not affected by its origin. If created by deed its efficiency is the same as if it had been created in the same form by will. No more and no less could be done by virtue of it in the one case than in the other. Its effective agency to produce the result intended is neither strengthened nor weakened by the nature of the instrument used by the donor of the power to create it. The power, however or whenever created, authorized the donee by her will to divest certain defeasible estates and to vest them absolutely in one person. If this authority had been conferred by will, instead of by deed, the right to act would have been precisely the same, and the power would have neither gained nor lost in force. . . . 176 N. Y. 493.

"As we said through Judge Cullen in the Dows case: 'Whatever be the technical source of title of the grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it.' This accords with the statutory definition of a power as applied to real estate, for it includes an authority to create or revoke an estate therein. (Real Property Law, sec. 111.) Such was the effect of the exercise of the power under consideration, for it both revoked and created estates in the real property and the interests in the personal property. No tax is laid on the power, or on the property, or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act." 176 N. Y. 494.

As in *Orr* v. *Gilman*, 183 U. S. *supra*, we must accept this decision of the New York Court of Appeals holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed. That power was exercised under the will of Laura Delano, a right which was conferred upon her under the laws of the State of New

York and for the exercise of which the statute was competent to impose the tax in the exercise of the sovereign power of the legislature over the right to make a disposition of property by will. *United States* v. *Perkins*, 163 U. S. 625-28; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 288.

We cannot say that property has been taken without due process of law, within the protection of the Fourteenth Amendment, by the manner in which the Court of Appeals has construed and enforced this statute. *Orr* v. *Gilman*, 183 U. S. *supra*.

Nor do we perceive that the effect has been to violate any contract right of the parties. It is said that this is so, because insteadof disposing of the entire estate, ninety-five per cent of the property included in the power has been transferred and five per cent taken by the State; but as there was a valid exercise of the taxing power of the State, we think the imposition of such a tax violated no contract because it resulted in the reduction of the estate.

Certainly the remaindermen had no contract with the donor or with the State. For whether the remaindermen received aliquot parts of the entire estate or the same was divested in whole or in part for the benefit of others in the class, depended upon the exercise of the power by the donee. The State was not deprived of its sovereign right to exercise the taxing power upon the making of a will in the future by which the estate was given to the appointees.

We find no error in the judgment of the Surrogates' Court entered on the remittitur from the Court of Appeals, and the same is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 240.—October Term, 1906.

Winthrop Astor Chanler, et al., Plaintiffs in Error, *vs.* Otto Kelsey, Comptroller of the State of New York.	In error to the Surrogates' Court of the County of New York and State of New York.

[April 15, 1907.]

Mr. Justice Holmes dissenting.

I have the misfortune to differ from the majority of my brethren in this case, and although the argument which seemed and still seems to me unanswerable was presented and has not prevailed, I think that the principles involved are of sufficient importance to justify a statement of the reasons for my dissent. A State succession tax stands on different grounds from a similar tax by the United States or a general State tax upon transfers. It is more unlimited in its possible extent, if not altogether unlimited, and therefore it is neccessary that the boundaries of the power to levy such taxes should be accurately understood and defined.

I always have believed that a State inheritance tax was an exercise of the power of regulating the devolution of property by inheritance or will upon the death of the owner,—a power which belongs to the States; and I have been fortified in my belief by the utterances of this Court from the time of Chief Justice Taney to the present day. *Mager* v. *Grima*, 8 How. 490, 493. *United States* v. *Perkins*, 163 U. S. 625, 627, 628. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 288. *Plummer* v. *Coler*, 178 U. S. 115, 124, 126, 137. *Billings* v. *Illinois*, 188 U. S. 97, 104. *Campbell* v. *California*, 200 U. S. 87, 94. *Cahen* v. *Brewster*, 203 U. S. 543, 550. See also *Matter of Sherman*, 153, N. Y. 1, 4. For that reason the power is more unlimited than the power of a State to tax transfers generally, or the power of the United States to levy an inheritance tax. The distinction between State and United States inheritance taxes was recognized in *Knowlton* v. *Moore*, 178 U. S. 41, 58, and whatever may be thought of the decision in *Snyder* v. *Bettman*, 190 U. S. 249, I do not understand it to import a denial of the distinction reaffirmed by the dissenting members of the Court. 190 U. S. 256.

If then a given State tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by

the State Court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. *Matter of Pell*, 171 N. Y. 48, 55. *Matter of Seaman*, 147 N. Y. 69.

It is not denied that the tax under consideration is a succession tax. The Court of Appeals treated it as such in the present case. It said "If the power had been exercised by deed a different question would have arisen, but it was exercised by will and owing to the full and complete control by the legislature of the making, the form and the substance of wills, it can impose a charge or tax for doing anything by will." *Matter of Delano*, 176 N. Y. 486, 494, reversing s. c., 82 App. Div. 147. That it was such a tax and valid for that reason was decided in *Matter of Dows*, 167 N. Y. 227, affirmed by this Court. *Orr* v. *Gilman*, 183 U. S. 278, adopting the New York view, 183 U. S. 289. And these decisions and some of the other decisions of this Court cited above were relied upon by the Court of Appeals. 176 N. Y. 492. See further *Matter of Vanderbilt*, 50 App. Div. 246; affd. 163 N. Y. 597. *Matter of Lansing*, 182 N. Y. 238, 248. Probably the tax would be invalid for other local reasons besides those mentioned in *Matter of Dows*, but for the construction which it has received. *Matter of Pell*, 171 N. Y. 48, 60.

This being then a succession tax, I should have thought it plain that there was no succession for it to operate upon. More precisely, even if otherwise any element of succession could have been found, a matter that I think would need explanation, the execution of the power did not depend in any way upon the continued cooperation of the laws of New York by way of permission or grant. I am not concerned to criticise the statement of the Court of Appals that in substance it is the execution of the power that gives to the grantee the property passing under it. It is enough if it is remembered that the instrument executing the power derives none of its efficiency in that respect from the present laws of New York. It is true that the instrument happens to be a will, and that it could not have operated as a will except by the grant of the privilege from the State at the time

when Mrs. Delano died. But what would execute the power depended, in the first place, upon the deed creating it, and if that deed did not require a will but only an instrument otherwise sufficiently characterized, it did not matter whether the instrument was also good as a will or not. *Ela* v. *Edwards*, 16 Gray, 91, 100.

What the deeds which I am considering required was "an instrument in its nature testamentary to be acknowledged by her (Mrs. Delano) as a deed in the presence of two witnesses or published by her as a will." The language was chosen carefully, I presume, in view of the incapacities of married women at that time. By the terms used a will was unnecessary. It was enough if Mrs. Delano sealed and acknowledged an instrument in its nature testamentary in the presence of two witnesses, whether it was good as a will or not. *Strong* v. *Wilkins*, 1 Barb. Ch. 9, 13. *Heath* v. *Withington*, 6 Cush. 497. This she did. In *Orr* v. *Gilman*, 183 U. S. 278, the power was created by will, and, what is more obviously material, it required a will for its execution, and so might be held to invoke and submit itself to the law in force when the execution should take place. Therefore that case has no bearing upon this. The ground upon which this tax is imposed is, I repeat, the right of the State to regulate or, if it sees fit, to destroy inheritances. If it might have not appropriated the whole it cannot appropriate any part by the law before us. And I also repeat that it has no bearing upon the matter that by a different law the State might have derived an equal revenue from these donees in the form of a tax. I do not understand it to be suggested that the State without compensation could have appropriated the remainder after Mrs. Delano's life, which Mr. Astor parted with in 1844 and shortly following years. If it could not have done so I am unable to see on what ground this tax is not void. The English decisions throw no light upon the question before us because they are concerned only with the construction of statutes which, however construed, are law.

Mr. Justice MOODY concurs in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.